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A COMPARATIVE ANALYSIS OF CORPORATE FRAUD

by

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ABSTRACT

The law is stated as at July 2006, before the enactment of the United Kingdom Fraud Act 2006. This thesis covers 'serious' corporate fraud and not commonplace petty fraud. I examined corporate fraud, concentrating on a comparison of the United Kingdom's fraud with that of two civil law neighbouring countries, France and Germany, both with high financial activity, and also with a few American states, common law systems like the English legal system. The objective of this study is to identify ways of combating fraud in the UK by enquiry and discovery as to how fraud occurs and how the two different legal systems- civil and common law- treat fraud. The study reveals factors contributing to corporate fraud and recommendations for combating corporate fraud. Exploring the concept of fraud, my findings are that corporate fraud is facing exponential increase, with the UK government beginning to acknowledge this. I examined the agencies that combat fraud in the states mentioned above including the UK. Although the UK is party to an impressive number of Treaties, which help to combat fraud, treaties dealing with terrorism, drug dealing, money laundering, and other organised crime, corporate fraud is still a serious problem.

The conclusions can be summarised as follows. The UK could learn much from the French legal system and the way France prosecutes corporations as per Articles 132, 222, 432, 433 and 435 of the French Penal Code. Germany's Criminal Code is equally comprehensive in its prescriptive definitions of frauds including corporate frauds as in chapters 8, 19, 2, 23, 24, 25, 26 and 30 of the German Criminal Code. The new UK's non-codified general, core, offence of fraud, with fraud offences maintained in other statutes such as the Companies Act, likens the UK fraud regulation closer to the US's with its Criminal Code and other statutes that deal with fraud. The UK has not yet caught up with the US Sarbanes-Oxley Act 2002 as regards electronic business systems' rules. The USA's federal prescriptive code for fraud offences is akin to the French and German criminal codes and these are found in US Federal Penal Code Title 18, Part 1, Chapter 47, sections 1020 to 1084. Legal privilege is fraud exempt in the United but not in France and Germany. Legal privilege in the UK is partly exempt for SFO investigations and mandatory money laundering reporting.

CHAPTER 1 - THE CONCEPT OF SERIOUS FRAUD

Fraud is defined in the Oxford Dictionary¹ as “the quality of being deceitful; criminal deception; the using of false representations to obtain an unjust advantage or to injure the rights or interests of another; a dishonest trick”². The UK Fraud Bill 2006 includes the concepts of ‘false representation’ and ‘dishonesty’.

Researchers and practitioners writing on the subject of fraud give the subject their own definitions. Graycar³ defines fraud as ‘*behaviour involving the use of dishonest or deceitful conduct in order to obtain some unjust advantage over someone else*’. Duffield and Grabosky⁴ (2001) defined fraud as ‘*obtaining of value or avoiding an obligation by means of deception*’. Duffield and Grabosky classified fraud as fraud committed against an organisation by a principal or senior official, fraud committed against an organisation by a client or employee, fraud committed against a number of individuals through print or electronic media or by indirect means and fraud committed against one individual by another in the context of direct face-to-face interaction. Other legal scholars⁵ have defined fraud as ‘*some form of dishonest conduct resulting in the obtaining of a monetary or property benefit to the perpetrator*’ (McGowan, 1999)⁶; ‘*seeking to obtain property belonging to another*

¹ Oxford English Dictionary, 2003, Oxford University Press.

² See also Halsbury’s Laws (4th Edn) para 663 which gives the meaning of fraud in Australian law through decisions of cases.

Also see the legal dictionary Words and Phrases Judicially Defined, Butterworths, 3rd edn, .1989, page 278.

³ Adam Graycar, Director, Australian Institute of Criminology, in a paper , (2001), “The psychology of fraud- trends and issues”.

⁴ G.Duffield and P.Grabosky, “The psychology of fraud”, Australian Institute of Criminology.

⁵ UK scholarly writings on fraud include M.Levi, “The prevention of plastic and cheque fraud :A Briefing Paper”, (2000), HORDSD and A.Doig & M.Levi, “New Public Management, old populism and the policing of fraud”, (2001), Public Policy and Administration, 16(1) pp91-113 ; M.Levi & J.Handley, “Criminal Justice and the future of Payment Card Fraud”, (2002), Inst. For Public Policy Research.

⁶ M.McGowan is commander of the New South Wales Fraud Squad.

See www.smh.com.au/articles/2003/02/27/1046064145169.html

through deception' (Smith, 1997)⁷; *'dishonestly obtaining a benefit by deception or other means'* (Butler, 2000).⁸

In the context of this study, I define fraud as wilfully practiced dishonesty with a view to gaining or planning to gain an unlawful financial advantage or causing or planning to cause an unlawful financial loss on behalf of himself or another.

Empirical examination of fraud often combines seemingly diverse behaviours under this criminal classification, for example Grabosky et al (1997)⁹, Weisburd et al (1991)¹⁰, Friedrichs (1996)¹¹, Dirkis and Nicoll (1996)¹². Grabosky et al included the American Medicaid frauds, social security frauds, income tax evasion and also industrial pollution and employer negligence, whilst Weisburd et al attempted to rank various white-collar offences according to complexity and severity of injury or financial loss. In Weisburd's analysis, securities and anti-trust offences were top of the list and tax fraud, credit card fraud and bank embezzlement were at the bottom of their list. Despite diversity in the ways fraud is perpetrated, a common feature among

⁷ R.G.Smith, "Measuring the extent of fraud in Australia", Trends and Issues in Crime and Criminal Justice, November, 1997. Fraud costs the nation considerably more than any other type of crime. It is surprising, therefore, that so little is known about the nature and extent of fraud. Smith reviews existing data on fraud trends in Australia and identifies ways of improving the level of understanding of the extent to which such crime occurs.

⁷ Butler, Brendan (2000) Fraud control – A state perspective, Paper presented at the Australian Institute of Criminology Conference, August 2000.

⁹ Grabosky, P & G. Duffield , (2001) "Red Flags of Fraud", Trends and Issues in Crime and Criminal Justice. Journal

¹⁰ D.Weisburd, , S. Wheeler, E. Waring and N. Bode Crimes of the Middle Classes: White-collar offenders in the federal courts, (Yale University Press., New Haven, 1991)

¹¹ D.O.Friedrichs, Trusted Criminals: White Collar Crime in Contemporary Society, (Wadsworth Publishing Company, Melbourne, 1996)

¹² M.Dirkis, and G Nicoll , "Corporate and White-Collar Crime." In K Hazlehurst (ed) Crime and Justice: An Australian Textbook in Criminology, (LBC, NSW 1996)

all forms of fraud is that it is an *intentionally deceptive activity that is often highly rationalised*. In discussing some forms of organisational crime, Coleman (1987)¹³ noted that ‘trust violators’ such as those employees who siphon funds gradually over time, often rationalise their criminal behaviour as ‘borrowing money’ or as ‘normal business practice’. This is consistent with the ‘everybody does it’ rationale where perpetrators feel it is unfair to be targeted when most other offenders go free (Coleman, 1987).

Fraud resulting in millions of pounds of loss include credit card fraud (Smith, 1997), copyright fraud (Grabosky and Smith, 1996)¹⁴, superannuation fraud (Frieberg, 1996), telemarketing fraud (Grabosky and Duffield, 2001), pyramid schemes (Grabosky and Duffield, 2001), direct marketing frauds (Sweeney, 2000)¹⁵, investment fraud (Munchie and McLaughlin, 2001)¹⁶ and creating and propagating computer viruses (McCowan, 1999).¹⁷ Copyright fraud includes the pirating of software and CD’s, the illicit reproduction of designer labels, trademarks and designs and patent infringement, accounting for some nine billion pounds each year in the UK¹⁸.

¹³ J.Coleman, (1987), “Towards an integrated theory of white-collar crime.” American Journal of Sociology, 93:406-39

¹⁴ P.Grabosky and R. Smith (1996) “Fraud: An Overview of Current and Emerging Risks”, Trends and Issues in Crime and Criminal Justice, 62, Nov 1996.

¹⁵ B. Sweeney, (2000) Direct marketing code of practice: an important cog in the new consumer protection regime, Australian Business Law Review 28(1): 35.

¹⁶ J.Muncie and E McLaughlin , The Problem of Crime: Crime, Order and Social Control, (Sage Publications, London, 2001)

¹⁷ P.McCowan, (1999) , “Business Fraud”, <http://www.gnl.com.au/businessfraud.htm>

¹⁸ E.Gibson, “Trading standards gets GBP 5 million grant to combat piracy” http://www.gamesindustry.biz/content_page.php?aid=22991. M.Wicks at the Intellectual Property Crime Group in London quoted figures which state that piracy costs the UK film music and game industries up to GBP 9 billion per year.

English law has not provided a definition of fraud¹⁹ until the Fraud Bill 2006²⁰, nor was there a substantive offence of fraud at criminal law²¹. Some perceive fraud²² as criminal and unethical behaviour and the term; ‘white-collar crime’ is used as an alternative to the word ‘fraud’²³.

Fraud under Illinois law is not a specified offence but is the term generally used for deception, not necessarily with the result of financial loss and includes the suppression of the truth, as well as the presentation of false information. Here, fraud is defined as anything calculated to deceive and it is clear and well-established Illinois law. The Illinois definition concentrates on the word ‘deceive’.

Before the UK Fraud Bill 2006, there had been no substantive offence of ‘fraud’ in English criminal law even though there are offences that cover fraudulent activity and fraudulent conduct involving ‘deception’ and ‘dishonesty’. The contemporary term ‘fraud’ can cover a wide spectrum of criminal activity ranging from minor offences such as benefit fraud to sophisticated frauds involving complicated financial transactions and large sums of money. There are common law offences of ‘conspiracy to defraud’²⁴ and ‘fraudulent trading’²⁵. An English example of the

¹⁹ Though the “legal test” for dishonest assistance, is fraud and has been considered by three main decisions, namely in the Court of Appeal in Royal Brunei Airlines v Tan; the House of Lords in Twinsectra Ltd v Yardley; and the Privy Council in Barlow Clowes International Ltd v Eurotrust International Ltd. Dishonest assistance involves consideration of the suspected person’s individual’s experience, knowledge, intelligence and actions. Until the decision in Barlow Clowes, the test could be defined as to whether the solicitor dishonest by the ordinary standards of a reasonable and honest solicitor, did realise that he was dishonest by these standards. Dishonest assistance is found in Abou-Rahman v City Express Bank of Lagos[2006] CA.

²⁰ The Fraud Bill 2006 defines fraud as false representation, failure to disclose information and an abuse of position.

²¹ See Cannane v J Cannane Pty Ltd (in liquidation) [1998] 153 ALR 163 at 172.

²² F.Page, “What is fraud?” New Law Journal, 28th Feb 1997.

See also T.Waters, “Fraud in prospect and hindsight”, Fraud Intelligence, Jan 2002.

²³ H.Croall, (1992), White Collar Crime, Open University Press, at pg 19.

²⁴ See R v Byatt [2006] 2 Cr App R(S) 116, for an example of conspiracy to defraud found, even though the conspirator withdrew before any property was obtained.

²⁵ R .J O’Connor v R [2004] EWCA (Crim) 1295.

offence of deceit is the case of R v Clucas and O'Rourke²⁶. This offence of deceit follows the three elements derived from Derry v Peek²⁷, fraud proved by (1) knowingly or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. In Scott v Brown, Doering, McNab & Co²⁸, a contract artificially to inflate the price of shares in order to give them a fictitious premium on the stock market, was held to be illegal as a conspiracy to commit an illegal act by deceit and fraud.

UK Case Law on 'Conspiracy to Defraud'

In R v Cushion²⁹, Justice Williams said that fraud really means no more than dishonesty. This upholds the broad meaning of fraud consisting of the two elements of dishonesty and deprivation but not deceit as was originally decided in the House of Lords in Derry v Peek³⁰. Yet the element of deceit, though not included in the Scot case, was classed as an element of fraud in the case R v Theroux³¹. Today, case law supports criminal sanctions for fraud when it means dishonesty as per the decision of the Court of Appeal in R v Ghosh³².

UK – Fraud was not classed as an Offence by Statute

Until the 2006 Fraud Act, English courts still had not prescribed the constituents of fraud³³, neither is serious fraud defined, but is commonly expected to be such if it is a

²⁶ [1959] 1WLR 244

See also, S.Ramage, "Misrepresentation", Accounting Technician, McMillan Scott Publishers, July 2005.

²⁸ [1892] 2 QB 724, [1891–4] All ER Rep 654

²⁹ [1997] 150 ALR 45

³⁰ (1889) 14 App Cas 337

³¹ [1993] 2 SCR 5

³² [1982] QB 1053.

³³ Editorial, New Law Journal, 21 May 1999.

complex embezzlement, a “long firm fraud³⁴”, and corporate fraud or organised crime³⁵.

Although there is no statutory offence of fraud in the United Kingdom as at June 2006, the Home Office set out the offences that it considers are offences of fraud in its Report “*Counting Rules for Recording Crime*”, published in April 2003. Among the offences, which the Home Office counts as fraud, are the following:-

1. False statements by Company Directors, etc. Under Theft Act 1968 section 19³⁶.
2. The common law offence of conspiracy to defraud³⁷.
3. Carrying on business with intent to defraud under section 458 of the Companies Act 1985³⁸.
4. Fraudulent trading under the same section³⁹.
5. Fraudulent misappropriation of funds under the Proceeds of Crime Act 2002⁴⁰.
6. Making statements or forecasts known to be false, deceptive or misleading, or dishonestly concealing facts, or recklessly making statements, promises or forecasts which are misleading, false or deceptive, contrary to section 397 of the Financial Services and Markets Act 2000⁴¹.
7. Obtaining pecuniary advantage by deception (apart from cheque and credit card fraud) under Theft Act 1968 section 16⁴²;
8. Suppression, etc of documents, under the Theft Act 1968 section 20⁴³.
9. Evasion of Liability by Deception, under Theft Act 1978 section 2⁴⁴.

³⁴ A “long firm fraud” is the common term used for outfits which set up as firms, usually retail businesses, who seduce suppliers into complacency by buying stock, initially very small amounts and paying promptly, gaining a record of being good customers. .

³⁵ G.Geis, R.F. Meir, L.M. Salinger, *White Collar Crime*, 3rd ed, (Free Press, London, 1995).

³⁶ Supra Footnote 7.

³⁷ R v Bell, Sugrue, Brock, Gardner, and Challacombe [2004] unreported

³⁸ Versailles Trade Finance Ltd v Clough [2001] EWCA Civ 1509.

³⁹ R v Cuzner-Charles and Mahmood [2004] unreported.

⁴⁰ Cronos Containers NV v Palatin [2002] EWHC 2819.

⁴¹ R v Rigby, Bailey and Rowley (2005) unreported.

⁴² R v Damon-Aspen [2004] unreported, an insurance fraud via internet marketing.

⁴³ J.Rush, Channel 4, 8th, December 2005, United Kingdom.

⁴⁴ R v Carr and Jeffrey [2004] Unreported.

10. Concealing, disguising, converting, transferring or removing criminal property from the jurisdiction – section 327 Proceeds of Crime Act 2002.
11. Entering into or becoming concerned in an arrangement, which that person knows, or suspects, facilitates the retention, use or control of criminal property – section 328 Proceeds of Crime Act 2002.
12. Acquiring, using or possessing criminal property – section 329 Proceeds of Crime Act 2002.
13. Cartel offences, under The Enterprise Act 2002 sections 183 and 185⁴⁵.
14. Forgery, under Forgery and Counterfeiting Act 1981 section 1⁴⁶.
15. Copying a false instrument, under Forgery and Counterfeiting Act section 2⁴⁷.
16. False Accounting under the Theft Act 1968 section 17(1)⁴⁸.

For the first time in the UK, a statutory core fraud offence will be in place alongside and complimenting other fraud offences as in statutes that deal with financial dishonesty- statutes such as the Insolvency Act 1986, the new Companies Act 2006 and the Financial Services and Markets Act 2000. Ramage's analysis⁴⁹ of SFO cases in the period 1997 to 2003 reveals that the Serious Fraud Office (SFO) uses most often the charge of 'conspiracy to defraud'. This most used charge therefore deserves examination.

UK 'Conspiracy to Defraud' Common Law Offence

Following the implementation of section 12 of the Criminal Justice Act 1987, the Director of Public Prosecutions issued guidance as to the circumstances in which it would be appropriate to prefer a charge of 'conspiracy to defraud'.⁵⁰ The maximum

⁴⁵ The case of Vehicle Inspectorate v Arriva(West Sussex) Ltd [2000] DC, 6th December 2000 was a case before the Act and the Roche Pharmaceutical cartel case came after the Enterprise Act.

⁴⁶ R v Damon-Aspen [2004] unreported is a fraud by forgery case.

⁴⁷ The elements of this offence are mutatis mutandis. but the copy must know or believe the original to be false.

⁴⁸ In Scot-Simmonds [1994] Crim.L.R 933, the court rejected the defence that the accounts were qualified.

⁴⁹ My analysis of 5 years of SFO cases found that the SFO used the charge of fraudulent trading in 18% of the 50 cases, false accounting charge in 14% of the cases, theft charge for 12%, corruption charge for 8% and conspiracy to defraud charge for 48% of these cases.

⁵⁰ Mens rea is an essential ingredient in the crime of conspiracy. In R v Lundy [1981] 1 All ER 1172, Lawton.L.J. said, "What the prosecution had to prove was a conspiracy to defraud which is an agreement dishonestly to do something which will or may cause loss or prejudice to another. The offence is one of dishonesty..."

penalty provided by section 12 Criminal Justice Act for the offence of conspiracy to defraud is ten years⁵¹, the same maximum punishment as per the proposed Fraud Act offence.

Today, in the UK, “a company”, the “legal person” is not prosecuted; instead, charges of ‘conspiracy to defraud’ are brought against identified senior individuals⁵². In the case of a one-man company, though, that man could not be charged with conspiring to defraud with the limited company because, in many cases the company concerned becomes insolvent at the same time the fraud is discovered and directors of an insolvent company become liable to contribute to the assets of the company⁵³

The SFO also use the charge of ‘conspiracy to defraud’ in cases of ‘misleading the markets’ and ‘insider trading’. ‘Insider trading’ is very difficult to prosecute and there are very few cases brought to trial in the United Kingdom. The Guinness case⁵⁴ involved the manipulation of share price, but charges of theft and false accounting were brought instead of ‘insider dealing’. It can be argued that this was a case of conspiracy to defraud through a share support operation in order to maintain the share price during and immediately during the merger.

In the Guinness fraud, Guinness’s advisor, Mr Roux, bought 5,000,000 Guinness shares and Guinness stockbroker, Mr Parnes, bought 2,950,000 Guinness shares. Mr Ronson, who came to an agreement with Saunders that if he made losses, Guinness would cover them, bought 8 million shares for £25 million.⁵⁵ In total, the share support conspiracy consisted of Rothschild Holdings buying 2.6 million shares,

⁵¹ In 1998, there were 1175 cases of conspiracy to defraud (in England and Wales) with an average sentence of 2 years. None of the convictions carried the full possible sentence of ten years. Source: Crime and Criminal Justice Unit, Home Office, October 2000.

⁵² B.Pettet., Company Law, (Pearson Education Ltd., London, 2001) pg 32.

⁵³ This is in fraudulent trading cases when in such cases an order will be made under s.213 Insolvency Act 1986.

⁵⁴ Guinness plc v Saunders and Another [1987] BCC 271.

⁵⁵ In the DTI Report on Guinness, at 6.2.5, page 75, “Mr Ronson said that he wanted confirmation from Guinness and Mr Parnes should arrange for Mr Saunders to ring him for that purpose. A few days later he in fact received a call from Mr Saunders, who expressed his gratitude for Heron’s assistance and confirmed that Mr Parnes had been authorised by him to give an assurance of protection against loss.”

Ronson's total of 3.3 million shares, a Mrs. Simon's 1.9 million shares, Guinness's own Pension Fund's 2 million shares and Morgan Grenfell and two others' 2 million shares. It was enough to achieve the result. It was the 'fees' totalling £18 million, which were really to recoup losses in holding the support shares that revealed the fraud. Mr Saunders was the main person prosecuted because he was fully aware of the share support operation and the basis of indemnities and success fees on which it was carried out. In addition, he authorised the resulting payments, which became necessary after the bid. Even if Saunders had claimed that he was acting in the best interests of the company Guinness,⁵⁶ the large size of the fees paid, under his authority, to other beneficiaries, cancelled any altruistic motive he might have claimed as his defence.⁵⁷

A 'conspiracy to defraud' charge can also be brought as a private criminal prosecution as in the case of Sears Group Properties Plc v Andrew Scrivener⁵⁸ in which Sears sued the group technical director for conspiracy to defraud the company between 1991 and 1997, alleging that Scrivener conspired with suppliers to overcharge on contracts for fitting out retail premises.

The conspiracy to defraud common law offence⁵⁹ may still be appropriate in cases where various kinds of criminality are involved and where prosecutions would involve many separate trials if brought under a statutory fraud offence. The Law Commission's 1994 report on 'Conspiracy to Defraud'⁶⁰ and its 2002 report on

⁵⁶ The DTI Report on Guinness states, at 11.9, pages 299,300, states about Mr Saunders: "... He claimed to have had no knowledge of any of the agreements or arrangements made with supporters by or on behalf of Guinness involving the promise of compensation against loss, or profit or success fee. He was, according to his testimony, also ignorant of the various arrangements made for the subsequent pay-off of those supporters, whether in cash or in kind, as of the warehousing arrangements made with Bank Leu, Morgan Grenfell, and Ansbachers after the bid. Where documentary evidence demonstrated that he was aware of a payment (e.g. to Heron) or other recompense (e.g. the Boesky investment), and thus precluded the suggestion of ignorance, he claimed to have believed it to be for a purpose unconnected with the previous support operation."

⁵⁷ Department of Trade & Industry Report, Investigations into the affairs of Guinness Plc , (HMSO,London.,1997)

⁵⁸ Sears Group Properties v Andrew Scrivener [1998] unreported.

⁵⁹ The DTI's figures state that 1,000 persons were charged in 1993 with the offence "conspiracy to defraud" and that 321 persons were convicted in the UK.

⁶⁰ Law Commission No.228, 1994

‘Fraud’⁶¹, the Commission listed specific types of conduct which would cease to be criminal if ‘conspiracy to defraud’ were abolished, these including dishonestly failing to fulfil a contractual obligation and dishonestly infringing a legal right.⁶² Developments in the law are awaited as to the future of the common law offence of ‘conspiracy to defraud’.

UK Fraud Bill 2006 –A Critical Analysis

The Law Commission reported⁶³ on the scope of creating a general offence of fraud that juries and all other parties concerned would find easier to understand a charge of conspiracy to defraud. The new offence is based on misrepresentation, non-disclosure, and abuse of trust⁶⁴. The writer now compares this proposed statutory fraud offence with the present common law offence of conspiracy to defraud to see exactly what the differences are that warrant a statutory offence of fraud.

The proposed fraud offence has the *mens rea*⁶⁵ of intention on the part of the defendant. The common law offence of ‘conspiracy to defraud’ has the same two elements as the proposed statutory criminal offence of fraud –‘attempting to defraud’⁶⁶ and ‘incitement to defraud’. The fraud offence intends that all the ‘deception’ offences under the Theft Acts are repealed. The Fraud Act offence is

⁶¹ Law Commission No.276, 2002

⁶² Such as the dishonest exploitation of another’s patent

⁶³ Law Commission Report No. 276, “FRAUD – Report on a reference under section 3(1) (e) of the Law Commissions Act 1965, July 2002.

⁶⁴ See R v Higgs [1986] 8 Cr App Rep (S) 440. Higgs was a management accountant who stole £3 million over a period of 5 years and gambled it all away. See also R v Aucott and Penn [1989] 11 Cr App Rep (S) 86, CA. They stole £2 million. See also R v Ross [1989] 11 Cr App Rep (S) 324. Ross stole £1.5 million from individuals who lost the value of their homes. See R v Wheeler [1992] 13 Cr App Rep (S) 72. Wheeler was the director and major shareholder in a company which purchased investments and insurance policies on behalf of clients and he used this money for his own benefit over a period of 4 years. Also R v Bingham [1992] 13 Cr App Rep (S) 45, CA. Bingham was a solicitor who stole £730,000 from funds under his administration, in what the court described as a persistent and blatant misuse of client money. R v Cove [1992] 14 Cr App Rep (S) 498 is another abuse of trust case in which Cove, a solicitor, stole £550,000 of client money. R v Peter Clowes [1992] unreported, is an abuse of trust case in which Peter Clowes ran an off-shore investment company offering services to elderly people promising to invest their savings of £16.9 million but spent it all on a lavish lifestyle.

⁶⁵ Mens rea is the culpable state of mind, which is necessary, together with the actus reus, for a criminal offence to be committed.

⁶⁶ See R v Morgan [1994] 16 Cr App Rep (S) 478, a case of an attempt to obtain £202,558 by deception from an insurance company. The attempt was sophisticated.

based on ‘dishonesty’ as in R v Ghosh.⁶⁷ In this case, the Court of Appeal concluded that the test for dishonesty for offences under the Theft Acts and for ‘conspiracy to defraud’ is the same. Lord Lane CJ set out the now classic test for ‘dishonesty’ for all such offences in R v Wai Yu-tsang.⁶⁸ Lord Lane said,

“In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised what he was doing was by those standards dishonest....”

This is the nearest to a definition of ‘dishonesty’ in English law. The *actus reus* of ‘conspiracy to defraud’ is the act of agreement to execute the unlawful conduct⁶⁹. The agreement must be express or implied or in part express and in part implied. The conspiracy remains even if the executed conduct takes a different form from that agreed⁷⁰.

The new statutory offence of fraud is designed to plug the legislative gaps and make it easier to tackle frauds like internet ‘phishing’. Statutory fraud requires dishonesty. There will be liability by omission, as occurs when directors who are aware that inaccurate figures or statements are being put out to the market, do nothing about it. A body corporate can be guilty of the statutory fraud offence as can an officer of the company who ‘consents or connives’ in the offence as per section 12 in the Fraud Bill 2006. Those guilty can be fined and sentenced to up to ten years in prison. For the new fraud offence to be committed, it must be proved that the defendant was acting dishonestly, and with the intention either to make a gain or to cause a loss or the risk of loss. It will not be necessary to prove that either the victim was deceived, or that he suffered any loss, provided there was the requisite dishonest intention to cause loss.

The three types of fraudulent behaviour under the Fraud Bill 2006 are:

⁶⁷ [1982] QB 1053.

⁶⁸ [1992] 1 AC 269, [1991] 4 All ER 664 at 670.

⁶⁹ DPP v Doot [1973] AC 807, [1973] 1 All ER 940, HL.

⁷⁰ R v Bolton [1991] 94 Ct App Rep 74

(1) Fraud by false representation - this covers any representation made knowingly or with awareness that it may be false or misleading. It may be express or implied and relate to fact or law. It includes a representation as to a person's state of mind by any means to any recipient – including a machine. Internet 'phishing'⁷¹ is caught, as is fraud via on- line banking systems. An inaccurate corporate warranty⁷², representation or claim could be prosecuted as a false representation if made dishonestly with the necessary intent.

(2) Fraud by failure to disclose information – this applies where there is a legal duty to disclose. All professionals, companies and their officers are under a wide range of duties to disclose information – for example to their clients/customers, to the market if they are listed, under contracts (e.g. insurance contracts), and to their regulators. Boards now have an additional reason for ensuring that their published announcements are complete and accurate. If not, they may all be criminally liable, even those who were bystanders. More widely, anyone who provides 'creative' curriculum vitae when applying for a job, fails to disclose relevant details on an insurance application, or provides a reference for someone which doesn't provide a complete picture may face prosecution under this provision. It may be used to prosecute tax fraud where incorrect or incomplete tax returns or import/export declarations are made contrary to the statutory obligation to make full and accurate disclosure.

(3) Fraud by abuse of position – The defendant must have been in a privileged position and under an obligation to safeguard the victim's financial interests, which he dishonestly abuses with the necessary intention. The abuse may be by an act or omission. Types of relationship where this may arise include employer and

⁷¹ Phishing attacks use both social engineering and technical subterfuge to steal consumers' personal identity data and financial account credentials. Social-engineering schemes use 'spoofed' e-mails to lead consumers to counterfeit websites designed to trick recipients into divulging financial data such as credit card numbers, account usernames, passwords and social security numbers. Hijacking brand names of banks, e-retailers and credit card companies, phishers often convince recipients to respond. Technical subterfuge schemes plant crimeware onto PCs to steal credentials directly, often using Trojan keylogger spyware. See www.antiphishing.org

⁷² Repair firm Accord Customer Care Solutions Ltd. charged with warranty fraud. . offering Latitude or Precision corporate models with only a one-year warranty. www.warrantyweek.com/newsroom/headlines-2005-second.html

employee, director and company, professional adviser and client, agent and principal, partners and even personal relationships including carers of friends or relatives.

UK - Fraud Records

An examination of the present-day mechanics of recording crime in the UK reveals that, for example, the City of London Police statistics are analysed by value according to type of fraud contrary to the West Yorkshire Police fraud figures, which cover 6 monthly periods and are analysed by victim type. Yet, the Home Office Counting Rules for Recording Crime⁷³ give the standard ways to count fraud in the UK. The new criminal fraud offence will not clear up the confusion caused when different government agencies count fraud in different ways, or the confusion that occurs when various police forces count fraud crimes in various ways, notwithstanding the Home Office Counting Rules. There is no audit of the Home Office fraud statistics. The public will not know the true extent of fraud. There are offences in other statutes such as false representation to gain RIBA qualifications as per the Architects Act 1997 which carries the penalty of a fine but which is a criminal fraud under the new Fraud Bill 2006 yet may continue to be dealt with under the Architects Act 1997. The common law offence of 'conspiracy to defraud'⁷⁴ is being kept for the time being for complex frauds with many defendants.⁷⁵

⁷³ Home Office Research Development & Statistics Directorate, April 2003.

⁷⁴ In *Re London and Globe Finance Ltd* [1903] 1 Ch 728, the House of Lords held that the essence of conspiracy to defraud was dishonestly depriving another of something that was either his, or, which he was, or would be, or, might be, entitled but for the commission of fraud.

Dadourian Group International Inc (1) Alex Dadourian (2) Haig Dadourian (3) v Paul Simms (1) Seliahman (2) Jack Dadourian (3) Helga Dadourian (4) [2006] Chancery Division. The First Claimant had entered into a deal whereby Charlton Corporation Plc ("Charlton"), a company owned by the Third and Fourth Defendants and run by the First and Second Defendants, agreed that it would open a letter of credit in return for being allowed to purchase and exercise an option to purchase certain manufacturing equipment. Charlton failed to open the letter of credit. The First Claimant terminated the contract on the basis of repudiatory breach. Charlton alleged that its obligation to open the letter of credit had not yet arisen and that the First Claimant was in repudiatory breach for failing to acquire all the equipment that was to be sold under the contract. At arbitration the arbitrator concluded that Charlton was in breach of contract. Further, the arbitrator said that one or more of the Defendants had made fraudulent misrepresentations to the Claimants about Charlton. Damages were awarded in the arbitration in favour of the Claimants against Charlton. Proceedings were brought against the Defendants for conspiracy to defraud or injure the First Claimant. The Claimants claimed that they would not have entered into the contract with Charlton had they known that the Third and Fourth Defendants were behind the company.

In the UK government's Fraud Review Report 2006, issued after the Fraud Bill was drafted, recommendations were made for the creation of a National Fraud Strategic Authority, a new Financial Court, and a National Fraud Reporting Centre; an increase in the maximum sentence for fraud from 10 to 14 years (the same as for money laundering) and importantly a higher priority for fraud within existing police policies. Whether these recommendations are followed through and whether they will enhance the combating of UK fraud remains to be seen.

France- Fraud Offence in Criminal Code

In France, a statutory offence is included in the Code de Procedure Penale (CPP) which was enacted in 1958 when the 1808 Code d'Instruction Criminelle (CIC) was completed. The Code Penale (CP) 1810 was revised in 1992 and came into force in 1994⁷⁶. Criminal offences in France are divided under three headings, these being-crimes, delits and contraventions. Crimes are offences punishable by life imprisonment or other fixed term imprisonment. Delits are offences punished under the law by imprisonment or a fine of at least 3,750 Euros. Contraventions are punished by a maximum fine of 3,000 Euros. In France, a corporation **can** be prosecuted for fraud⁷⁷, as well as officers of the company. As a life sentence cannot be given as punishment even for serious fraud, it means that a fraud offence is either a delit or a contravention, depending on seriousness.

Germany- Fraud Offence in Criminal Code

⁷⁶ M.Delmas-Marty & J.R.Spencer, *European Criminal Procedures*, (Cambridge University Press, Uk, 2002) at page 219.

⁷⁷ The French *Code Penale*, Article 121-2 states: "Legal persons , with the exception of the State, are criminally responsible.. in the case of offences which are prescribed by the law or by *reglement*, committed on their account by their agents or representatives. However, local authorities are only criminally liable for offences committed when exercising public services which may be contracted out. The criminal responsibility of legal persons does not exclude that of natural persons who commit or are accessories to the same offence."

Germany previously used the Roman Law of 1532, the *Constitutio Criminalis Carolina*. Like France, Germany has a written constitution, the 1949 *Das Grundgesetz*. Germany has a Code of Criminal Procedure, the *Strafprozeßordnung* of 1877. The Criminal Code of Germany **does not** deal with corporate responsibility. For corporate fraud, responsibility is attributed to individuals who act in the capacity of a company's legal representative or its board of directors.

US Fraud Statutes

In the United States, the 1772 Pennsylvania Consolidated Statutes included a Statute of Frauds. Still valid today, this statute states, "all leases, estates, interests of freehold or terms of years, or any uncertain interest of, in, or out of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents, thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making such parol leases or estates, or any former law or usage to the contrary notwithstanding, except all leases not exceeding the term of three years, unless by deed or note, in writing, signed by the party so assigning, granting or surrendering the same, or their agents, thereto lawfully authorised by writing or by act and operation of law."

This became Pennsylvania's Uniform Written Obligations Act 1927; similar to the English Prevention of Frauds (Investments) Act 1939 and finally the English Prevention of Fraud (Investments) Act (Licensing) (Amendment) Regulations 1982 and the English Prevention of Fraud (Investments) Act Fees Regulations 1983, even though there has never been a definition of the word "fraud" in English law.

Each State in the U.S had adopted at least one Statute identifying agreements that must be made in writing, the Statute of Frauds or an Act for Prevention of Frauds and Perjuries. The US Computer Fraud and Misuse Act, US Code Chapter 47, 1030 - Fraud and Related Activity in Connection with Computers, are similar to the English Electronic Communications Act 2001. There was still rife misrepresentation devised

by electronic trickery and skill, taking advantage of the differences in interstate, currency valuation, time zones, computer systems, and trade laws of different countries.

Conclusion to Chapter 1

Since 1988, the UK has had an agency, the Serious Fraud Office, an authority that investigates and prosecutes serious fraud, yet neither ‘fraud’ nor ‘serious fraud’ has ever been defined by statute and this has been the situation for past hundreds of years. However, in 2006, a Fraud Bill came before the UK Parliament. Having a new core statutory criminal offence of fraud and a complimentary array of other statutes to deal with certain explicit frauds may prove to be good weaponry against fraud in general⁷⁸, although its simplistic framing may present challenges to practitioners and the courts. The Fraud Bill 2006 makes fraud a term, which denotes criminal behaviour that transgresses the rules by which society conducts its affairs. ‘Deceit’⁷⁹, is not a necessary element, though in many cases ‘deceit’ is likely to be present. The Fraud Bill is concerned with ‘dishonesty’.

France, Germany and the United States all punish the criminal offence of fraud by way of a Criminal Code. In the US, a corporation cannot be charged with fraud, only its representatives, the same as in Germany. In France, corporations can be charged with fraud and so can they since the English Fraud Bill 2006 was passed.

⁷⁸ Companies Act 2006 widens the scope for shareholders to sue directors in a derivative action. A derivative claim will be available for a “cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director. There are seven new general directors’ duties (see sections 171 to 177):- to act within the powers of the company; to promote the success of the company; to exercise independent judgment; to exercise reasonable care, skill and diligence; to avoid conflicts of interest; not to accept benefits from third parties and to declare any interest in proposed transactions or arrangements with the company.

⁷⁹ ‘Deceit’ has been partially defined by statute-in Theft Act 1968, s15(4). See also Metropolitan Police Comr v Charles[1977] AC 177 ; R v Lambie [1982] AC 449; R v Preddy [1996] AC 815.

CHAPTER 2 - SPECIAL INSTITUTIONS THAT COMBAT CORPORATE FRAUD

UK Serious Fraud Office (SFO)

The UK has a specialist organisation⁸⁰ for the investigation and prosecution of serious fraud- the Serious Fraud Office (SFO). The SFO came into being in April 1988. At the same time, every fraud squad in the United Kingdom became part of what was known as the Fraud Investigation Group (FIG) and the FIG worked under the Crown Prosecution Service. Police officers who had volunteered for the positions form these fraud squads.

One of the findings of the 1986 Fraud Trials Committee Report (the Roskill Report) was that the English system for bringing frauds to trial was poor. The opening section of the Roskill Report set out the scale of the problem:

“The public no longer believed that the legal system in England and Wales was capable of bringing perpetrators of serious frauds expeditiously and effectively to book. The weight of evidence suggests that the public is right. In relation to such crimes and to the skilful and determined criminals who commit them; the present legal system is archaic, cumbersome, and unreliable.”

The need for a new and unified organisation responsible for all the functions of detection, investigation, and prosecution of serious fraud cases was the main recommendation⁸¹ of the Roskill Report. The Report also recommended that there should be an independent monitoring body (A Fraud Commission)⁸² to be responsible for studying the efficiency with which the fraud cases are conducted which should make an annual report.

⁸⁰ In France all frauds, economic offences, are investigated by specialist sections of the police working under the supervision of the prosecutor and the examining magistrate. In Germany, there is a common criminal code which distinguishes between ‘ordinary’ fraud and ‘economic crime’, the latter embracing serious fraud. In Germany ‘economic crime’ is handled by specialised prosecution units working with the police and including prosecutors, accountants and a business administration expert who oversees the accountants. See Lord Roskill, Fraud Trials Committee Report, Volume 2/2, (HMSO, London, 1986) at page 222.

⁸¹ Fraud Trials Committee Report, Volume 2/2, page 179, Recommendation 1 of 109 recommendations.

⁸² Ibid, Recommendation 46.

The judge in a serious fraud trial should have power to order that a deposition be admissible in evidence at the trial where the witness is unavailable – this already occurs in certain cases. That there should be reciprocal arrangements between countries⁸³ regarding the taking and receipt of evidence and those experts' reports should be admissible in evidence has been realised in the European Evidence Warrant and the Criminal Justice Act 1993 (Commencement No.10) Order 1999 (SI 1999 No.1189) and the Criminal Justice (International Co-operation) Act 1990.

The Roskill Report's recommendation to replace⁸⁴ trial by jury in cases of complex fraud is a contemporary subject for debate. The Roskill Report recommended that the prosecution or the defence should be entitled to apply to a High Court Judge if the case falls within the Guidelines for such a trial and that the defence should not be able to appeal against any subsequent conviction on the ground that the wrong tribunal was used. This is already included in the Criminal Justice Act 2003 but needs to be debated further, according to the Act.

The criteria for a case to be taken by the SFO are as follows:-

- * cases where the monies at risk are at least one million pounds (although the SFO does still investigate cases of less value if they are in the public interest. The Davie Report, appraising the SFO seven year performance, stated that this factor⁸⁵ 'is simply an objective and recognisable signpost of seriousness and likely public concern, rather than the main indicator of suitability');
- * cases likely to give rise to national publicity and widespread public concern; cases requiring highly specialised knowledge of stock exchange practices or regulated markets;
- * cases with an international dimension; cases where legal, accountancy and investigative skills need to be brought together; and

⁸³ The courts have had to deal with cross-border issues since R v Ellis (1899) 1 QB 230 and R v Holmes (1833) 12 QBD 23.

⁸⁴ See Recommendation 82 of the Roskill Report, Volume 2/2 on page 186: "For complex fraud cases falling within certain Guidelines, trial by a judge and two lay members should replace trial by judge and jury. We refer to the new tribunal as the "Fraud Trials Tribunal" (FTT)"

⁸⁵ The Lord Chancellor and Law Officers' Departmental Report 1998-1999, Serious Fraud Office: Aims and Objectives, (2000), HMSO.

* cases which are complex and in which the use of Section 2, Criminal Justice Act 1987 powers may be appropriate.

UK - SFO and Criminal Justice Act 1987, Section 2

Section 2 of the Criminal Justice Act 1987⁸⁶ contains provisions where, not police, but lawyers and accountants in the SFO question suspects after giving a written notice that they must answer questions about an investigation at a specified time and place or immediately. This power to question is a delegated power from the Director of the Serious Fraud Office. In serious fraud cases, the directors of companies, solicitors, and accountants must answer section two notices. Section 2 consists of the power to question individuals, the power to requisition documents and powers of search and seizure. Section 2 powers were modelled on the powers conferred to DTI inspectors by section 432 Companies Act 1985.

The Director of the SFO may use section 2(3) Criminal Justice Act 1987 in order to demand⁸⁷ the supply to him of specified documents, which appear to him to relate to his investigation. A section “(3) request is similar to a request by Companies Act 1985 section 434(1) and in fact section 2(3) request is based on this. The difference is that the Companies Act request does not impose any degree of specificity on the documents⁸⁸ to be produced, other than they are documents relating to the company. It can also be compared with section 8 of the Police and Criminal Evidence Act 1984, of which section 8(1) (b) refers to “material specified in the application which is likely to be of substantial value (whether by itself or together with other material) to the investigation of the offence”.

⁸⁶ The fact that the section encompasses inquiries of anyone whom the Director of the SFO ‘has reason to believe has relevant information’ provides an extremely wide discretion.

⁸⁷ It is an offence not to comply. Section 2(13) to (17) Criminal Justice Act 1987 provides that refusal to comply, false compliance or falsification, concealment, destruction or other disposal of documents relevant to an investigation, are offences. In any case, the SFO can use section 3 CJA 1987 to receive or divulge information obtained from a variety of sources. A reasonable excuse to refuse to answer questions may include public policy and the public interest in preserving secrecy balanced by the public interest in the investigation of fraud. See Re Arrows [1992] Ch 545, [1992] BCLC 126.

⁸⁸ Companies Act 1985 section 434(6) defines ‘document’ as “information recorded in any form; and, in relation to information recorded otherwise than in legible form, the power to require its production includes the power to require production of a copy of the information in legible form”.

In R v Secretary of State for the Home Department, ex parte FinInvest SpA, discussed later on the subject of Mutual Legal Assistance, there was extensive argument about the requirements of specificity of section 2 notices. This issue was again raised in R v MJ O’Kane⁸⁹.

Section 2(4) to (7) Criminal Justice Act 1987 contains provisions relating to the issue of a warrant by a justice of the peace to for the search of premises. A warrant may be applied for in respect of any documents and no restrictions are provided for in respect of excluded material, personal records, journalistic material or special procedure material as defined in the Police and Criminal Evidence Act . The FinInvest case mentioned above was one in which the issue was also about search warrants because a search warrant was issued against a solicitor who had at one time been a director of CMM, a corporate services company engaged in incorporating off-shore companies for FinInvest.

“The Guinness case” is another case, which had as its core the issue of section 2 powers. The Chief Executive of Guinness was charged and found guilty of a share support operation. In May 1987, the police were formally asked by the Director of Public Prosecutions (DPP) to carry out a criminal investigation. Whole transcripts of the interviews were read out to the jury over many days during the trial. Saunders was found guilty. In July 1991 Mr Saunders lodged an application (number 19187/91) with the European Commission of Human Rights.

Saunders⁹⁰ applied for judicial review in R v Director of Serious Fraud Office, ex parte Saunders⁹¹ and argued that notices under section 2(3) served on Guinness Plc

⁸⁹ [1996] STC 1249.

⁹⁰ See

1986 DTI investigation of Guinness Plc

1988 SFO pre-trial review of R v Saunders

1991 R v Seelig and another [1991] 4 All ER 429

1998, Saunders v UK [1998] 1 BCLC 362; Saunders v Punch [1998] 1 All ER 234

1999, IJJ and others v UK (Applications 29522/95, 30056/96, 30574/96 2002.

R v Lyons, Parnes, Ronson and Saunders (House of Lords) 14/11/2002.

⁹¹ (1988) DC.

were invalid because at the time of service, he, Saunders, had been charged with forty offences arising out of or connected with the documents required by the notices to be produced. It was held that Saunders had been charged with 40 offences arising from the Guinness bid, using the SFO interviews because the SFO's powers under the Criminal Justice Act did not come to an end because he was then under the control of the Police⁹². Saunders, being unsuccessful in this case, complained to the European Commission that his right to a fair procedure guaranteed by Article 6(1)⁹³ of the Human Rights Convention was breached.

UK's SFO Case- Saunders v UK

The European Court of Human Rights in Brussels found for Saunders. There was a violation of Article 6 of the Human Rights Convention, only as regards the use made by the prosecution of evidence given under compulsion. Concerning the law in section 2 Criminal Justice Act 1987, the Commission said that it caused the justice system of the United Kingdom to have a two-tier system of legislation characterised by establishing investigation proceedings in which those under investigation are obliged to co-operate with the investigators and to answer their questions without immunity, making it possible that answers obtained in those investigation proceedings are used in evidence at a subsequent trial against someone who has been under investigation. It noted that the UK justifies this as being for public protection against serious fraud, yet this compulsory answering of questions is not used for other serious crimes such as murder, making the UK's justification flawed.

The Commission noted that in ordinary crime cases, in Europe, discovery of the crime nearly always precedes the investigation and that the investigation after an ordinary crime is merely to discover who did it, whilst in UK Serious Fraud Office cases, the investigation generally has as its main purpose, to establish whether a crime has been committed at all. The violated right did not concern answers to questions put under the section 2 interviews, but use of such evidence. The Court's

⁹² This is exactly how the 2002 Enterprise Act works also. The SFO can call an interview repeatedly until they are satisfied with the information provided.

⁹³ Article 6(1) ECHR states: 'In the determination of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time, by an independent tribunal established by law.'

decision was that it was not illegal to be questioned compulsorily, but the suspect must be allowed his right not to incriminate himself. Article 6(1) ECHR gives no right to refuse to answer questions. *The protection of Article 6 starts from the time when a person is charged with a criminal offence.* The object of Article 6 is to protect a person throughout a criminal process.

After this ECHR decision, the SFO no longer use scripts of their ‘Section 2 interviews’ as evidence at trial. R v Carson and others [2003] was the first case in which a ‘section 2 interview’ script of one defendant was used by another defendant in that defendant’s defence in a joint trial. The trials were separated after one defendant objected. The Criminal Justice Act 2003 introduced statutory provisions regulating the extent to which a defendant may adduce a co-defendant’s confession in a joint trial⁹⁴.

The 1959 European Convention on Mutual Assistance in Criminal Matters ensures that countries afford to each other “the widest measure of mutual assistance in proceedings in respect of offences the punishment of which at the time of the request for assistance falls within the jurisdiction of the judicial authorities of the requesting country”. This Convention and an additional Protocol in 1978, underpins the UK’s International Co-operation Act 1990. The UK has made some reservations to the Convention, these being, the reservation to refuse to assist if the person concerned has already been convicted or acquitted of an offence based on the relevant conduct in the United Kingdom or in a third state. It reserves, in respect of Article 3⁹⁵, the right not to take evidence or gather other material if it is against the public interest, if it affects the Crown, security or UK public order; nor will the UK agree to a section 2 request in the case of double jeopardy⁹⁶. Article 3 of the European Convention on Mutual Assistance in Criminal Mutual Assistance in Criminal Matters states:

1. The requested Party shall execute in the manner provided for by its law, any letter rogatory relating to a criminal matter and addressed to it by the judicial authorities of the requesting Party for the purpose of procuring

⁹⁴ See J.Hartshorne, “Defensive use of a co-accused’s confession and the CJA 2003”, (2004), *International Journal of Evidence & Proof*, Vol 8, Number 3, p165-178.

⁹⁶ See Maxwell-King v USA [2006] EWHC 3033 (Admin).

evidence or transmitting articles to be produced in evidence, records or documents.

2. If the requesting Party desires witnesses or experts to give evidence on oath, it shall expressly so request and the requested Party shall comply with the request if the law of its country does not prohibit it.

The requested Party may transmit certified copies or certified Photostat copies of records or documents requested, unless the requesting Party expressly requests the transmission of originals, in which case the requested Party shall make every effort to comply with the request. However, the UK Crime (International Co-operation) Act 2003 allows overseas freezing orders to be given effect regardless of the nature of the authority making the order in a participating country unlike the previous use of Clause 19 of the Mutual Assistance Convention, which allowed for seizure of evidence only if a court or authority makes the request for assistance. This means that there can take place, “fishing expeditions”, using section 2 notices, contrary to article 6(1)⁹⁷ of the European Convention on Mutual Assistance in Criminal Matters.

UK- SFO, OFT and UK Enterprise Act 2002

In the UK, it is a criminal offence for individuals to enter into cartel⁹⁸ agreements. The Enterprise Act implements the EU Market Abuse Directive 2003/6/EC, and repeals the Traded Securities (Disclosure) Obligations 1994 and makes for a widened Part VI of the Financial Services and Markets Act 2000⁹⁹. The Act states that its purpose is to

“establish and provide for the functions of the Office of Fair Trading, the Competition Appeal Tribunal and the Competition Service; to make provision about mergers and market structures and conduct; to amend the constitution and functions of the Competition Commission; to create an offence for those

⁹⁷ Article 6(1) of the European Convention on Mutual assistance in Criminal Matters states that the requested Party may delay the handing over of any property, records or documents requested, if it requires the said property, records or documents in connection with pending criminal proceedings.

⁹⁸ A cartel is a group of companies, which have entered into an agreement to fix their prices or to share the market so that they can raise prices by removing and/or reducing the competition around.

R. Leifmann, *Cartels, Concerns and Trusts*, New York Press, 1999), pg 19.

⁹⁹ Market abuse is as a civil offence, punishable by fines, and administered by the Financial Services Authority (FSA), the UK financial regulatory agency.

entering into certain anti-competitive agreements; to provide for the disqualification of directors of companies engaging in certain anti –competitive practices; to make other provision about competition law; to amend the law relating to the protection of the collective interests of consumers; to make further provision about the disclosure of information obtained under competition and consumer legislation; to amend the Insolvency Act 1986 and make other provision about insolvency; and for connected purposes.”

The Enterprise Act was criticised as being “woefully inadequate”¹⁰⁰. After receiving a multitude of new powers in 2004 and publishing consumer and business ‘guides’ on the application of these powers in 2005¹⁰¹ in 2006 the UK’s Office of Fair Trading (OFT) set about using these powers. The OFT reported that it opened 23 cases involving possible cartel activity and launched formal investigations in relation to seven cases where it had reasonable grounds to suspect a cartel infringement had occurred. Of particular note, in the last financial year it conducted 92 on-site inspections in seven cases, some of which were carried out using its criminal enforcement powers, in conjunction with the Serious Fraud Office. Although it is not clear how many of these were in relation to cartel cases, this is a high number of inspections. In addition, it entered into 22 conditional leniency agreements, a clear sign that its guidance on leniency and its relatively ‘open-door’ approach to questions regarding the leniency procedure has encouraged businesses to come forward.¹⁰¹

UK Financial Services Authority (FSA)

Other UK bodies that combat fraud are the Office of Fair Trading (OFT) and the Financial Services Authority (FSA). The Financial Services and Markets Act 2000 established the Financial Services Authority as the sole regulator for the Financial

¹⁰⁰ J.Reynolds, “What lies beneath?” Financial Accountant, Sept/Oct 2005.
and caselaw Feetum & ors v Levy & ors (CA) The Times Newspaper, 21 December 2005

¹⁰¹ S.Holmes, A.Horrocks and M. Gardner, “Cartel Regulation in the United Kingdom”, on www.mondaq.com

Services Industry in the United Kingdom. The FSA has 4 statutory functions- to promote market confidence; to increase public awareness of the financial system; to protect consumers and to reduce financial crime. It hears complaints and received 65 complaints in 2002 and 140 in 2003. The FSA aim, amongst other things, to stop market abuse¹⁰². It investigates and takes civil proceedings against whose conduct amounts to market abuse¹⁰³ and can impose multi million pound fines¹⁰⁴ on companies¹⁰⁵. The 2005 Memorandum of Understanding- between the

Association of Chief Police Officers, England & Wales and the FSA¹⁰⁶ states that Criminal prosecutions brought by the FSA are normally initiated by way of Information and Summons. FSA Investigators do not have powers of arrest and FSMA (section 176) provides that police constables have powers of search and seizure in connection with a warrant obtained by the FSA. "Where the FSA is investigating an offence which the FSA has powers to prosecute, the normal procedure for interviewing a suspect is for the FSA to invite the individual suspected of committing an arrestable offence to attend for an interview on a voluntary basis. Such interviews are carried out in compliance with the provisions of the Codes of Practice under PACE"¹⁰⁷. When it is inappropriate to conduct a voluntary interview

¹⁰² As illustrated in Meyer Brown Competition Bulletin , July 2006,
"The OFT has published its decision regarding the completed acquisition by Stericycle International LLC of Sterile Technologies Group Limited."

¹⁰³ L.Warwick-Ching., "Brokers struggle to hit FSA deadline", Financial Times, 4 September 2004.

See also M.Atherton. and G.Gilmore," "Watchdog in pursuit of rogue advisors", Times Newspaper September 4th, 2004.

¹⁰⁴ C. Montished. , "FSA exposes long-running deception by Shell executives", Times Business Newspaper, 25th August 2004.

For example, in proceedings commenced by the Financial Services Authority , the UK High Court ruled in December 2004 that Adrian Sam & Co (ASC) and John Martin, one of ASC's two partners, were knowingly involved in the UK activities of an illegal overseas investment firm (a boiler room) and they were ordered to pay £360,000 (approximately \$700,000) to 63 investors involved in the boiler room scam. A bankruptcy order was granted against John Martin in 2006. On March 29, 2006, Adrian Sam, the second partner in ASC was also made bankrupt by the court on the FSA's application. The court found that the involvement of John Martin, Adrian Sam and ASC was an integral part of the illegal boiler room activity.

¹⁰⁶ See <http://www.fsa.gov.uk/pubs/fsacolp.pdf>

¹⁰⁷ Section 4.6 of the Memorandum.

in situations where it would prejudice an ongoing investigation or risk the destruction of evidence or the dissipation of assets; or where a suspect declines an invitation to attend a voluntary interview, the police will be requested to arrest the person for questioning after a warrant to arrest has been obtained from a Magistrates' Court¹⁰⁸. “A warrant obtained pursuant to section 176 FSMA authorises a police constable to enter the premises specified in the warrant ;search the premises and take possession of any documents or information appearing to be documents; take copies of, or extracts from, any documents or information appearing to be of the relevant kind; require any person on the premises to provide an explanation of any document or information appearing to be of the relevant kind or to state where it may be found; and use such force as may be reasonably necessary”¹⁰⁹ .

UK Office of Fair Trading (OFT)

The Office of Fair Trading was given new powers through the UK's Enterprise Act 2002. The Act introduced a criminal offence of dishonestly entering a cartel agreement. They often use the method of a 'dawn raid' to make an unannounced visit to suspected companies and officials.¹¹⁰ The Act makes directors liable for competition law breaches, creates new tests for the control of mergers, and creates criminal sanctions of 5 years' imprisonment, fines, and disqualification for cartel offences¹¹¹. The Office of Fair Trading investigates companies on consumer

¹⁰⁸ Ibid section 4.7

¹⁰⁹ Ibid section 4.12

¹¹⁰ This is a statutory power bestowed to the Office of Fair Trading (OFT); Office of Communication (Ofcom); The Rail Regulator (ORR); Gas & Electricity Markets Authority (OFGEM); Director General of Water Services (OFWAT) and Director General of Gas for Northern Ireland.

¹¹¹ There is also the new Consumer Credit Act 2006 which reforms the Consumer Credit Act 1974 and aims to create a fairer and more transparent credit market. The DTI has identified the key elements as empowerment of consumers to challenge unfair lending and introduction of more effective dispute resolution mechanisms; improved regulation through a streamlined licensing system; extension of protection to all consumer credit and consumer hire agreements; and by creating a more proportionate regime for businesses. Failure to comply may affect eligibility to hold a consumer credit licence. Customers will have the right to refer unresolved disputes to the Financial Ombudsman Service. Full details are available on the Financial Ombudsman Service website: <http://www.financial-ombudsman.org.uk/news/out-and-about.htm>. A calendar setting out the timetable for implementation of the Act can be accessed on the DTI website <http://www.dti.gov.uk/consumers/consumer-finance/credit-act-2006/Timetable/page29768.htm>.

protection issues¹¹². It is assisted by the Assets Recovery Agency¹¹³ in seizing the assets of the guilty.

The Department of Trade and Industry (“DTI”) is a government body that investigates limited companies, partnerships, and directors of companies. Under the Companies Act 1985¹¹⁴, the DTI can compel accountants, actuaries, auditors, lawyers, and bankers to give assistance in connection with a company under investigation¹¹⁵. The DTI maintain that they have the right to investigate because ‘in a free market, all those who deal with companies whether as investors, suppliers, or consumers should be protected from unscrupulous or fraudulent practices.’ The Secretary of State has powers of investigation where fraud or other misconduct is suspected, where shareholders have been denied reasonable information, or where he

The Consumer Protection Co-operation (CPC) was formally adopted in October 2004 with the aim of improving and formalising co-operation between Member States on cross-border infringements of EU consumer law, and took full effect in 2006. The OFT has prepared draft guidance outlining the scope of its new 2007 powers, and the rights and obligations of a business when an inspection is conducted, and is currently consulting with key stakeholders regarding the wording. The draft guidance can be accessed on the OFT website http://www.offt.gov.uk/shared_offt/reports/comp_policy/oft884con.pdf.

¹¹³ The ARA was established in 2005 and is to be merged with the Serious Organised Crime Agency (SOCA) by April 2008. This will be done by amending the Proceeds of Crime Act 2002. The ARA was created by the Proceeds of Crime Act 2002 which gave it powers to carry out investigations leading to the confiscation and civil recovery of proceeds of crime. In 2005/2006 the ARA recovered £4.1m. In Walsh v The Director of the Assets Recovery Agency, it was found that the ARA’s powers were not criminal proceedings in disguise and therefore did not in this case constitute a breach of human rights. On its merger with the SOCA, it is proposed to extend the ARA’s civil recovery proceedings powers to the main prosecutors in England, Wales and Northern Ireland.

¹¹⁴ Section 447 Companies Act 1985 allows the Secretary of State, to give directions to a company... requiring it to produce such documents as may be specified or authorise an officer or other competent person to require the production of documents.

¹¹⁵ Especially as the UK has a most active venture capital system, compared to Germany, for example. See G.Rinderman, n, “Venture Capitalist Participation and the Performance of IPO Firms: Empirical Evidence from France, Germany, and the UK”, 2002 First, international venture capitalists participated with different frequencies in the considered IPO markets. They were the most active in the British IPO market and the least participating at the German Neuer Markt. By contrast, firms backed by nationally operating venture capitalists do not outperform non venture-backed IPOs in the sample. IPOs at the German Neuer Markt perform significantly worse than issues in the two other countries.

considers it in the public interest. Cartel regulation in the UK operates on two levels, with the possibility of civil proceedings being brought against companies and criminal proceedings being brought against individuals. Full immunity from both types of action is potentially available under the OFT's leniency programme, and both companies and individuals are actively encouraged to contact the OFT if they suspect cartel activity. If found guilty of an infringement, companies face large fines and employees can face prison sentences – with directors also subject to the possibility of being disqualified from being a director for up to 15 years.

France - Criminal Liability and Corporate Fraud

Under article 121-2 of the Criminal Code of France, the criminal liability of legal persons has two features. First, their responsibility is indirect, or derived, insofar as natural persons must have committed offences attributable to legal persons. Consequently article 121-2 states that 'the criminal responsibility of legal persons does not preclude that of natural persons who are perpetrators of or accomplices to the same acts.' There are conditions for assigning criminal responsibility to legal persons under French law. One or more natural persons constituting either a body or representative of a legal person must first have committed the offence. This excludes cases in which an offence is committed by an agent or a subordinate. The body is responsible even if the natural person who did the fraud exceeded the authority vested in him. The legal person may be held criminally responsible and if the offence was committed on behalf of the legal person. As to sanctions, these are stipulated in the Criminal Code. Articles 131-138 of the Criminal Code state that the maximum rate of fine applicable to legal persons is equal to five times the maximum fine for natural persons.

As regards personal liability, the prescriptive French Code has fines and prison sentences for them. Article 324-7 of the French Penal Code states that natural persons, i.e. people and not companies, who are convicted of any of the offences provided for under Articles 324-1 and 324-2 incur the penalties of prohibition from holding public office or to undertake any professional activity. Any natural person who commits computer fraud must face the heaviest penalties. There is a prison sentence of two years. If such persons commit computer abuse fraud. They must also pay a 30,000 Euros' fine. The prison sentence and fine level go up, the more serious

the offence. For instance, obstructing or interfering with the functioning of an automated data processing system is punished by five years imprisonment and 75,000 Euros' fine plus a prohibition from holding professional or public office for five years plus a public display or dissemination of the fraud case decision.

France-Victims of Criminal Corporate Fraud

Victims of crime play a more active role in criminal proceedings than is possible in the UK. The CPP allows a civil claim to be dealt with as part of the criminal proceedings and by the same trial court [Article 3]. The victim may be joined as a party or trigger criminal proceedings himself. This is because criminal acts are automatically civil wrongs: Every violation of a criminal statutory provision is a fault in civil law and therefore a breach of Article 1382¹¹⁶.

Once named by the criminal court as the civil party, the victim is unable to appear as a witness in those proceedings. The decision of the victim to issue civil proceedings is irrevocable [article 5] and precludes participation in the criminal proceedings as a civil party. The right to be included in a case as a civil party only extends to those who have suffered from the commission of delits, serious crimes.

France- Financial Compensation for Fraud Victims

The concept of injuries is wide and includes material, physical or moral damage. The damage suffered must be the direct result of a recognised criminal offence. There is a scheme, similar to the UK criminal injuries compensation scheme, which is publicly funded and came into force in 1981. This scheme compensates victims of various kinds of theft and fraud if they were put in a grave financial situation by the crime [articles 706.14-15].

France- Time limits for Criminal Fraud Trials

¹¹⁶ Under Article 1382 Civil Code: "All human conduct of any kind which causes harm to another requires the person by whose fault it occurred to redress it". Harm is therefore a necessary element of liability. The basis of liability is very wide, and its width is extended by Article 1383 which states: "Everyone is responsible not only for the damage which he has caused by his conduct but also by his negligence or imprudence."

There are time limits on the duration of delit trials. There is no maximum time that a defendant can be held in pre-trial detention but if the offence charged carries a penalty of less than five years, as fraud offences do, and the defendant has no previous criminal record, only one renewal of up to six months is permitted.

France- Criminal Defendants

An essential feature of French criminal justice is the presumption of innocence, as it is known theoretically in the UK, through the ECHR Article 6(2). The rights of the defendant are not stated in the CPP but article 393 and article 116 gives the right of the defendant to know the details of the accusation against him. There is free legal aid for a lawyer to represent the defendant.¹¹⁷ An examining magistrate who has already opened an instruction, forming part of the preliminary stage of the investigation, especially in cases of organised crime, issues a rogatory commission.

France- Procedure Rules

If the offence, such as fraud, carries two years imprisonment, the examining magistrate has the power to remand in custody for security reasons, to prevent further offending, to preserve public order, or to protect the defendant. If the defendant is charged with a delit, the remand in custody cannot exceed six months in total. There are no compulsory interviews for serious fraud as there are in the UK by the Criminal Justice Act 1987 section 2.

France- Statute of Limitation

Unlike the UK, France has a statute of limitation for the prosecution of a criminal offence¹¹⁸. irrespective of whether a natural person or a legal person commits the offence. The statute of limitation can be interrupted or suspended pursuant to Articles

¹¹⁷ French Law-Criminal Law in France-information on criminal law at www.frenchlaw.com/criminal_law.htm

And www.ucl.ac.uk/laws/global_law/legal-news/french/index.shtml?criminal

¹¹⁸ Article 8 of the Criminal Procedure Code.

7 and 8 of the Criminal Procedure Code. France also prescribes for fraud offences in its Penal Code and prescribes separately for natural as well as legal persons¹¹⁹.

France - Fraud Monitoring Agency (TRACFIN)

France already has offences of bribery in Articles 435-3 and 435-5 of its Penal Code and was able to implement its 2000 ratification of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, bringing its first such case in April 2002 with regard to TRACFIN's suspicious large-scale transfers through a French Bank¹²⁰. Articles 432.10 to 432.14 of the French Penal Code deal with misappropriation of public funds, abuse of authority, passive corruption, insider trading and interfering with the public procurement process. Insider trading is treated as a criminal matter in France. The criminal police of France have economic and financial sections and specialised public prosecutors, provided for in Articles 704 and 705 of the Criminal Code.

A foreign person who is the victim of commercial fraud in France can take action in French courts, specifically to recover property rights, or embezzled funds and to receive compensation for damages. The person can bring the action in the criminal court or the civil court. In the majority of cases, commercial fraud will constitute a criminal offence and the case will be heard in the criminal courts, which have jurisdiction over fraud cases if the fraud constitutes an offence punishable under the French criminal Code.

In the, reverse situation, when it is a foreign person convicted of fraud, Article 324-8 states that “such an alien may be banished from French territory either permanently or for a maximum period of ten years”.

¹¹⁹ French Penal Code Article 132 deals with general provisions of criminal offences of natural and legal persons; Article 222, Chapter 11 deals with offences that cause harm to a person, material, financial, psychological.; Article 311-312 deal with penalties applicable to natural and legal persons in respect of extortion [312], misappropriation of property[314], fraudulent organisation of insolvency [314-7] other offences against property [321]destruction of property[322] unauthorised access to automated site [323], money laundering[324], passive corruption[432]additional penalties and liabilities of legal persons[435], etc.

¹²⁰ Report on the implementation of the OECD Convention Phase 1 : <http://www.oecd.org/dataoecd/39/60/2018956.pdf>

France- Fraud Litigation in the Civil Court

If the act is a tort, it is heard before the Civil Court. If the victim of fraud cannot prove the criminal character of the fraud in a criminal court, he can still seek reparation for damages in a civil court. If the fraud is proved in the criminal court, he can seek reparation for damages before the same criminal court. To bring a fraud case, the victim can directly summon the defrauder before the criminal court by means of a summons delivered by a bailiff, exposing facts and their criminal qualification. The judge then has the power to seek evidence to determine the truth.

Once a fraud case comes to court, French law makes it possible to take preventive measures to ensure the preservation of evidence and the solvency of the defendant. If the case is before the criminal court, the investigative judge can confiscate objects or documents necessary for the determination of the truth¹²¹. If money is confiscated, the court clerk can deposit it with the Caisse des Depots et Consignation (Official Receiver) or with the Banque de France. Once investigation is closed and the case has been brought before the court with jurisdiction that court will rule on the restitution.¹²² The investigating judge can place the person under investigation under judicial control¹²³. If the person is located outside of France, the French legal authorities can request his extradition from the authorities of the foreign country.

France- Commercial Code

If a fraud matter comes before French Civil Court, it will be of a fraud committed during a contract. It can also go to the Civil Court if the victim cannot prove the criminal character of the fraud. The Civil Court can be used since it has jurisdiction when the defendant is domiciled in France, if the act resulting in the tort was committed in France, or if the tort occurred in France.

¹²¹ Article 92 of the French Code of Criminal Procedure.

¹²² This shows the established French framework for restitution . It is to be noted that “restitution in English law is still under construction whereas German Courts have applied their law for more than 100 years.” F.Machtel, “The defence of ‘change of position’ in English and German Law of Unjust Enrichment”, 5 German Law Journal No.1, January 2004.

¹²³ Article 139 of the Code of Criminal Procedure.

The French Commercial Code covers frauds such as market abuse and bid rigging in France. For example, if an individual is acting fraudulently in relation to the conception, organisation, and implementation of anti-competitive practices, these come under articles 420-1, 420-2, and 420-6 of the Commercial Code and carry a sanction of 4 years imprisonment and/or a fine of US\$ 70, 000¹²⁴. Corruption is perceived to be less in France than in the UK or Germany, according to the International Crime Survey¹²⁵.

France-Financial Markets Authority (AMF)

France already has a Financial Markets Authority, AMF¹²⁶, (Autorité des Marchés Financiers) covered by Article 621-1 of the Monetary Code. Article 465-1, makes it a criminal offence for insider dealing, disseminating inside information or disseminating false or misleading information. Article 465-2 makes it a criminal offence of price manipulation. The AMF has regulatory sanctions, regulation 90-08 on insider dealing, regulation 98-07 on disclosure by issuers of information, and regulation 90-04 on market prices. France is mostly already compliant with the new directive, save for whistle blowing¹²⁷.

¹²⁴ Pricewaterhouse Coopers, "European Economic Crime Survey 2001", Pricewaterhouse Coopers, (2001).

¹²⁵ U.Zvekic, "International Crime Victim Survey: comparative advantages and disadvantages", International Criminal Justice Review, Vol 6.(1996)

¹²⁶ The AMF was created by the Financial Security Act 2003. France is preparing a draft bill on whistle blowing.

Matthias Schmidt*, "Whistle Blowing Regulation and Accounting Standards Enforcement in Germany and Europe – An Economic Perspective", Humboldt-University Berlin; Institute of Accounting and Auditing; Spandauer Strasse August 2003. It is of note also, that the US has whistle-blowing protection in the Sarbanes Oxley Act 2002. See R. E. Moberly, "Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win", (2005), University of Nebraska, Bepress Legal Series who questions the efficacy of SOX because, in its first three years, only 3.6% of Sarbanes-Oxley whistleblowers won relief through the initial administrative process that adjudicates such claims, and only 6.5% of whistleblowers won appeals through the process. However public companies must still reform their business cultures to encourage the free flow of information and reporting of wrongdoing. Only when all employees are watching – and no one is afraid to blow the whistle – will the incidence of fraud in public corporations drop to an acceptable level. (See V.J. Watnick, "Whistleblower Protections under the Sarbanes-Oxley Act: A Primer and a Critique", (2005), City University of New York, Baruch College, Bepress Legal Series).

France - Breach of Contract- Civil Fraud

French Civil Code deals with fraud that is deemed breach of contract. Breach of contract by corruption is a breach of the Employment Code (Code du Travail) L 152-6 which is the civil legislation on corruption in these matters as are Civil Code 88-287 on financial transparency in political life, The civil fraud of breach of contract can occur by a breach of the Civil Code 91-3 on transparency and conformity of public procurement. Corruption of public officials is dealt with through the implementation of Codes of Conduct drawn up by individual government departments, with disciplinary sanctions proscribing corrupt activity.

France has Monetary and Financial Codes, which regulate direct investment in France. In 2003, France included a New Regulation into its code to allow unfettered distribution of non-OECD securities into France without having to apply to the Treasury. This brings a higher risk of fraud into the French stock market but makes France one of the more attractive European states for non-OECD activity.

France - Central Corruption Prevention Agency (SCPC)

France also has a Central Corruption¹²⁸ Prevention Agency (SCPC), created in 1993 by statute. This agency has broad investigatory powers, including subpoena power and the power to compel the production of documents, similar to the UK's SFO section 2 Criminal Justice Act 1987. One of the agency's tasks is to draw up corruption prevention guidelines for various government departments, develop research, and audit methods to stop fraud and corruption. Mayors of local councils¹²⁹, chairs of regional councils and heads of private companies that provide a public service can initiate an agency opinion and report on fraud and corruption in their organisation.

In conclusion, about fraud in France, it is noted that France has more incidents of fraud by way of corruption. French enterprise plays an international role and

¹²⁸ In 1993 a report on corruption by Bouchery, was published. The report described French corruption as a "gangrene devouring society".

¹²⁹ V. Ruggerio, , Crime and markets, (Oxford University Press,Oxford,UK,2000)

according to the OECD's Report on the Application of the Convention to combat Bribery¹³⁰ France ranks services, fourth, for the export of manufactured products

Germany -Fraud as a crime

Like France, Germany has a criminal code. The current criminal code in use in Germany is the 1987 St Po. All criminal cases are dealt with by the ordinary court system, which is a four-tier structure consisting of the Amtsgerichte, the local courts; the Landgerichte, the district courts; the Oberlandesgerichte, the supreme courts and the Bundesgerichtshof, the Federal Supreme Court.

The St Po contains a systematic list of principles and criminal procedure is governed by several fundamental rules. They are either expressly stated in the basic law, the Courts Act or the St Po. There is upheld the presumption of innocence as stated in article 6(2) ECHR. The state prosecution authority has the sole right to prosecute and is under a duty to commence investigations if there is evidence that an offence has been committed. If an investigation discloses sufficient evidence to justify prosecution, the authority must bring charges (St Po 170(1)). This principle applies equally to the police who are obliged to conduct an investigation when there are grounds for suspecting that someone has committed a criminal offence (St Po 163).

In 1975, the office of the examining judge was abolished but there is still an investigation principle, which dominates the criminal procedure. The trial court itself establishes the facts, the state prosecution, the defendant's lawyer, and the defendant can influence the hearing of evidence by making formal motions and direct presentation of witnesses to the court. Improperly obtained evidence is excluded. The trial judge reads the files compiled by the police, state prosecution, defendant, witnesses, and experts. The state prosecution authority supports him. Oral relevant evidence can be introduced into the trial. The trial judge questions the defendant, witnesses and expert witnesses in person¹³¹. A decision must not be based on previous statements made by the witnesses at an earlier stage of the investigation and

¹³⁰ See website
<http://66.102.9.104/search?q=cache:Fuwg2oDHJO8J:www.oecd.org/dataoecd/36/36/262>.

¹³¹ St Po 160, 163.

contained in the investigation file. This is the case even if it becomes clear that important facts have not been dealt with at the trial, which must be held in public and in cases such as serious fraud, public interest in information will prevail. The difference between the German trial and the English trial is that the judge in Germany is not bound by legal rules of evidence or guidelines.

Germany - Federal Cartel Office (FCO)

The Act against Restrictions of Competition (ARC) combats criminal corporate cartel fraud in Germany. The ARC is enforced by the Bundeskartellamt (Federal Cartel Office, FCO) in Bonn. The FCO has 11 independent divisions that are responsible for different industry sectors and product markets. Infringements with regional effects only are dealt with by the State Cartel Offices (Landeskartellbehörden) but the majority of cartel cases are dealt with by the FCO.

Like the UK's OFT, the key enforcement priority of the FCO is the fight against price-fixing and bid-rigging cartels. Section 1 ARC corresponds to article 81(1) of the EC Treaty and broadly prohibits agreements or concerted practices between undertakings that have as their object or effect the prevention, restriction or distortion of competition.

Section 2 ARC corresponds to article 81(3) of the EC Treaty and exempts certain agreements from the prohibition of section 1 ARC. The FCO can impose fines on individuals and companies. The FCO's proceedings are governed by the ARC to the extent that the case involves only minor infringements which require a cease and desist order. However, where the FCO intends to impose fines, the proceedings are governed by the Code on Administrative Offences (Ordnungswidrigkeitengesetz) and the Code on Criminal Procedure (Strafprozessordnung).

The FCO can discover anti-competitive conduct through third-party complaints and the FCO has broad investigative powers. Once the FCO has completed its fact finding, it will issue a statement of objections setting out the underlying facts of the case, the alleged infringements and the FCO's legal assessment. Around the same time, the targets of the FCO's investigation will be given access to the FCO's file and have the opportunity to comment on the allegations.

The FCO's decisions are subject to appeal to the higher regional court (Oberlandesgericht) in Düsseldorf. Further appeal against the decision of the higher regional court is only permitted on questions of law, to the Federal Supreme Court (Bundesgerichtshof). The FCO publishes its decisions in administrative proceedings in a non-confidential version on its website (www.bundeskartellamt.de), whereas fining decisions rendered under the Code on Administrative Offences are not normally published.

The FCO's powers of investigation differ depending on whether the proceedings are governed by the ARC or by the Code on Administrative Offences.

In administrative proceedings, the FCO can conduct sector inquiries (section 32e ARC, similar to article 17 Regulation 1/2003) and request specific information from companies (section 59 ARC, similar to article 18 Regulation 1/2003). In addition, it can hear witnesses (section 57 ARC, similar to article 19 Regulation 1/2003) and – with the confirmation of the local court (Amtsgericht) – seize documents and other evidence (section 58 ARC).

In proceedings governed by the Code on Administrative Offences, the FCO can conduct inspections (dawn raids) provided that it obtains a search warrant issued by the local court. These inspections are not limited to company premises but can be extended to private homes of key individuals, cars, etc. In addition, the FCO can seize documents (eg, business correspondence, calendars, travel expense reports), electronic evidence (including e-mails) and other evidence. Normally, the FCO's officials are accompanied by police staff and IT experts who support the FCO in its investigations.

During the investigation, the company and the individuals concerned are, protected by fundamental rights of defence. Individuals do not have to respond to any questions asked by FCO officials if they have been accused of a violation of the competition rules or if the answer would expose them or a member of their family to the risk of criminal prosecution or prosecution under the Code on Administrative Offences. The fundamental rights of defence also include the right to legal advice and the FCO will normally be prepared to wait for approximately 30 minutes until external legal counsel is present before starting the inspection. Attorney-client

communication at the premises of the undertaking under investigation is only protected by legal privilege if the communication specifically relates to the ongoing investigation.

The FCO can impose fines against companies and individuals for intentional or negligent violations of the competition rules.

The level of fines range from €500,000 to €1 million for severe infringements, die-hard-core cartel activity such as price fixing, bid rigging, allocation of quotas, customers or territories and from €25,000 to €100,000 for less severe infringements. Fines in excess of €1 million could be imposed on companies up to a maximum amount of 10 per cent of worldwide turnover in the last completed business year. German law generally does not provide for criminal sanctions for violations of the ARC, except to this rule is section 298 of the German Criminal Code, which provides for a prison sentence of up to five years for bid rigging in tender proceedings. The statute of limitation is five years for severe infringements and three years for less severe infringements. However, investigatory measures conducted by the FCO, the European Commission or competition authorities of other member states will suspend the limitation period.

The FCO introduced a leniency programme in 2000, which was revised in 2006. The revised programme largely reflects the European Commission's 2002 leniency notice. The FCO's leniency programme is available both to companies and individuals. Cooperation with the authority, in principle, is treated as confidential. In particular, the authority is committed to protect the identity of a 'whistleblower' to the extent that this is possible. However, there are certain limits to this as the other cartel members will necessarily have access to the non-confidential part of the FCO's file once a statement of objections is issued and could, in certain cases, be able to draw conclusions from the content of the file. In addition, where the FCO has no other evidence, it may have to rely on the testimony of the whistleblower and will have to disclose this evidence to the other companies. Whistleblowers can be subject to damage claims and individuals could face criminal prosecution where the case at hand involves bid rigging. On March 15, 2006, the Federal Cartel Office ("FCO") published new guidelines for immunity and leniency in cartel matters ("2006

Guidelines"). The 2006 Guidelines amend and restate the conditions under which the FCO grants immunity (no imposition of fines) or extends leniency (reduction of fines), provided cartel members admit their involvement in the conduct at issue and cooperate with the agency's investigation. The FCO's 2006 Guidelines introduce a two-tier system of immunity for individuals, businesses, and associations of businesses.

The ARC contains a new rule on statute of limitation for private antitrust litigation under which the statute of limitation is suspended if the FCO, the European Commission or competition authorities of other member states initiate proceedings.

The FCO has always cooperated closely with the European Commission and the other member state competition authorities. Formal cooperation agreements of limited relevance are in place with France and the US.

The 2006 Guidelines define "leniency" as any reduction of a fine, with 50 percent being the ceiling. The 2006 Guidelines underscore the necessity for the applicant to open up completely to the FCO. As the 2006 Guidelines state, the applicant for immunity or leniency must cooperate "continuously and unreservedly" throughout the proceedings. Unlike many of its European counterparts, the FCO may impose fines on individuals (directors, executives, and employees). Except for cases of bid rigging, however, individuals do not face criminal prosecution.

Germany- Right to Silence

All participants in a criminal case must have the opportunity to speak, to make statements regarding the facts and the law and to introduce motions. In the pre-trial procedure, members of the public, initiate investigations because of reports to the police. In white-collar crime, a state official or authority often makes the report direct to the prosecutor's office. St Po 158 states that reports may be lodged in writing or orally at the state prosecution's office, at a police station, to a police officer in the street or at a local criminal court. Members of the state prosecution authority and the police service are obliged to act ex officio as soon as they learn about an offence¹³².

¹³² St Po 160, 163.

Unlike the English criminal system, the basic responsibility for the German police investigation and for reliability of evidence remains with the state prosecution and in contrast with the English, the German state prosecutors have a right of audience in all criminal courts and the prosecutor himself presents the case in court. German law upholds the right to silence of a suspect.

Germany- Fraud offences in the Criminal Code (StGB)

The Criminal Code (Strafgesetzbuch, StGB), as promulgated on 13th November 1998, details each criminal offence including fraud. There is a Statute of Limitation for prosecution in Chapter 5 of the Code. Chapter 8 offences are related to counterfeiting including counterfeiting of securities [section 151]. Chapter 19 deals with theft and misappropriation, chapter 20 with extortion, chapter 22 with fraud and breach of trust, chapter 23 with falsification of documents, chapter 24 with crimes of insolvency¹³³ and chapter 25 with punishable greed. Fraud and breach of trust offences are stated as fraud, computer fraud, subsidy fraud, capital investment fraud, abuse of insurance, obtaining benefits by devious means, credit fraud, breach of trust, withholding, embezzlement, and misuse of cheque and credit card fraud. Similarly, chapter 23 on falsification of documents is very detailed.

Germany- Breach of Contract - Civil Fraud

Frauds that have the element of dishonesty such as misrepresentation are treated as a breach of contract and not as a crime, unlike England, where deception is definitely an element of a criminal offence today, although it used to be treated as a tort of deceit.

Germany- Fraud Investigations

¹³³ It is to be noted that unlike Germany, "France has not yet adopted the UNCITRAL model and as to multi-nations, once a French court takes jurisdiction, French insolvency law automatically applies. French courts have jurisdiction to open insolvency proceedings against natural or legal persons exercising their business activities on French territory as well as for all possible actions based on French legislation. Localisation in France of the seat of a debtor's enterprises can justify the jurisdiction of the French courts. So is the presence in France of a debtor's establishment or certain assets. Also, if there are French creditors, this justifies the case to be based under the jurisdiction of French courts." J. Newton, *The Uniform Interpretation of the Brussels and Lugano Conventions*, (OUP, Oxford, 2001).

The state prosecution authority has a free hand in the way it chooses to conduct its investigation but powers of detention, search and seizure, surveillance, interception of telephone communications and body searches are subject to strict statutory control and should be proportionate to the crime. Pre-trial detention has to be ordered by the pre-trial judge¹³⁴.

The investigation by the prosecution is secret and the defence has no right to be present during the questioning of witnesses or experts by the state prosecution. During police interviews the defence lawyer is completely excluded, even when the accused is questioned. This is different to the English and American systems. Like England and Wales, pre-trial detention in Germany counts against sentence. If a search warrant is necessary, it must state the alleged offence and an exact description of the objects, which are being sought and cannot be a fishing expedition. The state prosecutor must examine documents found in this way. There is legal privilege, which covers priests, defence lawyers, certain members of the legal profession, tax and economic professions, and certain counsellors.

After compiling its case, the state prosecution transfers the case to the appropriate court, which decides whether there should be a trial. This court, held in camera, decides whether further investigation is called for. Then there is the trial, which is held in public, and all evidence is heard again by the court. There can be a re-trial in the following circumstances:

1. Falsification of documents relevant to the judgement;
2. Wrongful testimony of a witness or an expert witness¹³⁵;
3. An offence of the judge such as bribery or perversion of the course of justice;

Germany- Securities Fraud

¹³⁴ St Po 114, 116(a).

¹³⁵ R. Preussel, "The Experts Aren't Reliable Either: Why Expert Testimony on the Reliability of Eyewitness Testimony is Unwarranted in Alabama State Courts", (2006), Yale, Bepress Legal Series. The paper explores the admissibility of this expert testimony under the existing rules of evidence according to both federal law and Alabama state law, as well as court commentary on its admissibility, and concludes the liberal admission of such testimony is not warranted in the case of Alabama. Although this relates to Alabama, it can apply to the UK.

As to frauds such as bid rigging, Germany has criminal sanctions and a general offence of fraud. Section 15 of the Act obliges the issuer of securities, admitted to trading on a German Stock exchange, to publish new facts, which come within its sphere of activity if such information is price sensitive.

To comply with the new Directive on Market Abuse, Germany proposes the following new provisions: - The scope of the criminal law provisions will be extended to include other financial instruments in addition to the ones already on and will include commodity derivatives. The law will be changed so that just to be aware of the possibility of an impact on the market is to violate the prohibition. Section 12 of the WpHG regarding insider dealing and section 20a WpHG regarding trade and market manipulation will be amended.

Germany- Federal Financial Regulatory Authority (BaFin)

The specialist organisation that oversees financial services market abuse in Germany is the Federal Financial-Services-Supervisory Authority (Bundesanstalt für Finanzdienstleistungsaufsicht,) or BaFin.

The German Securities Trading Act 2003, enacted by the German Federal Ministry of Finance, legislates against market price manipulation. This is to comply with the EC Market Abuse Directive on insider trading and market manipulation. Material valuation misleading information can occur in amendments to annual accounts, alteration of company distributions of dividends, take-overs, acquisitions, compensation offers, corporate and financial actions, liquidity problems, granting or loss of material patents or licences, significant law or anti-trust suits, changes in key personnel and strategic decisions such as closing core businesses.

Germany also has a new Investment Modernisation Act 2003 to modernise and harmonise Germany's investment fund and tax laws, with particular attention to the regulation of hedge funds,¹³⁶ which are very desirable among its institutional and retail investors. Germany's BaFin, the Federal Supervisory Authority, supervises all investment.

¹³⁶ Hedge fund frauds are beginning to emerge and it is to be noted that of the UK, USA, France and Germany, only Germany has a regulated hedge fund market.

Germany-Deception –is a civil fraud in Germany

This fraud of deception occurs when a party creates a wrong impression or mistake in the mind of the other, causing him to make the declaration he made. If the other party knew the true state of affairs or would have entered into the contract anyway, then he cannot avoid the contract. Just like France, Germany has the right to avoid a contract, which must be exercised within a limitation period of one year of discovery of the deceit and within an overall limitation period of 30 years¹³⁷.

Fraud is committed by omission if there was a duty to inform, for example, in a contract, if that party has expert knowledge. Fraud relating to the sale of goods comes under contract law, the German General Conditions of Contract Act 1976, much like the English Sale of Goods Act. The limitation period in Germany is 30 years, similar to France and unlike the English 6 years for ordinary contracts and 12 years for speciality contracts such as Deeds. This can be said to be equivalent to the double jeopardy exemption in the UK when, at any time after being found not guilty of a fraud, if later substantial evidence proves otherwise, there can be a re-trial.

Germany- Fraud Overview

The concept of fraud in Germany is wholly different to the UK's. It concentrates on contract law and its breaches. When it is deemed a criminal offence, the issue of *mens rea* is itself an issue¹³⁸. "The German system of administrative fining depends on intention or negligence and German law does not seem to pose a high standard of proof regarding intention. As with English law, Germany does not recognise a defence of due diligence as this would weaken the deterrent effect of criminal law".¹³⁹ The German criminal policy framework has undergone profound changes in

¹³⁷ See Section 124 BGH. For discussions on the 30 year limitation, see the case Reichsgericht, Judgment of 11 March 1932 (Ruisdael case) at www.iuscomp.org/gla/judgments/bgh/rz320311.htm and www.ingentaconnect.com/content/kli/eelr/2000/00000009/00000004/00268317 -

¹³⁸ In German criminal law, the concept of 'intention' is being hotly debated. The debate has become "a minor industry in Germany." See G.Taylor, "The intention debate in German criminal law", (2004), Monash University Law School, Australia. See also G.Taylor, "Concepts of intention in German Criminal Law", Oxford Journal of Legal Studies, volume 24, Number 1, 2004, pages 99-127.

¹³⁹ From the summary points translated from a paper by Erik Gritter, "Effectiviteit en aansprakelijkheid in het economisch orderingsrecht", 2003, University of Groningen. See also Literature on German criminal law in English at www.iuscrim.mpg.de/forsch/straf/lit/e-

the last 15 years.¹⁴⁰ Bearing in mind that Germany is the most active user of EU cooperation structures¹⁴¹ and a driving force behind the establishment of the EU policing framework¹⁴².

The policing framework includes the following:

Council Framework Decision 2006/960/JHA on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union; Council Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties ; Council Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence; Council Framework Decision 2001/500/JHA on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime and Council Framework Decision 2001/413/JHA on combating fraud and counterfeiting of non-cash means of payment. This is evidence of Germany's subscription to fighting fraud¹⁴³.

US - Federal Criminal Procedure

The origins of the America Federal Procedure and that of its states including New York and Illinois lie in practices and traditions of English common law. Each state has its own constitution, separate from the US Constitution¹⁴⁴.

Each state has sovereign power with reference to the enactment and administration of all laws covering offences within its boundaries, which are not distinctly allocated to

[bib-idx.html](#) and Useful links on Criminal (Penal) Law at www.icpo-vad.tripod.com/crimen.html

¹⁴⁰ European criminal law (Asp.2001; Weyembergh.2004 at 263).

¹⁴¹ See Europol Report, 2006.

¹⁴² Occhipinti. (2003)

¹⁴³ See M.G.Cowles, J.Caporaso and T.Risse, Transforming Europe: Europeanisation and domestic change, (Ithaca, Cornell University Press, USA , 2006). See also J. Freidrichs, " Who wants what, when and why? International Police Cooperation and large European States", (2006), International Organisation Journal. See also M.Den Boer, "Towards an accountability regime for an emerging police governance", (2002), Policing and Society, 12, 245-289.

¹⁴⁴ For example, in the Illinois Constitution, article 1, section 8.1 states the detailed rights of a victim of crime.

the province of the federal government. In most states, the county is the unit of prosecution and a locally elected lawyer institutes criminal proceedings. Unlike the federal attorney, the county or state attorney has little central supervision. All states have an attorney general and his duties involve the protection of the interests of the state as a whole, particularly with reference to the various state departments, offices, and institutions.

US - Police Arrest Procedure

First, the person suspected and accused is arrested if the person wishing the accused to be charged swears a warrant that this individual has committed a specific offence. Then the police proceed to make the arrest. A person can also be arrested without warrant if a felony or serious offence is suspected. All persons tried in criminal courts must be carefully and accurately informed of the offence alleged.

US - Criminal Courts

The criminal courts consist of the lower courts or magistrates' courts, the district courts and the supreme or appellate courts. The jury is present at trial but unlike the English system, in America the jury can be challenged as to suitability before a case is tried. As in English courts, there is strict law of evidence. Evidence may be direct evidence, circumstantial or indirect evidence, primary and secondary evidence, written or oral evidence and the testimony of the accused.

Imprisonment is the means of punishment for criminal offences and although capital punishment is generally restricted to the offences of murder, kidnapping, rape, armed robbery, and burglary can be capital offences in some states. Both the states of Illinois and New York have a history of corrupt politics and organised crime. The US Attorney's Office for Illinois has a money laundering and asset forfeiture section, a gangs section, a public corruption section and an organised crime section.

US - Securities Statutes

The laws that govern the security industry of the whole of the USA are the Securities Act 1933 and 1934. The Sarbanes-Oxley Act 2002 was the reaction to the recent financial scandals in the USA of Enron and World-com and mandates a number of reforms to enhance corporate responsibility, enhance financial disclosures, and

combat corporate accounting frauds. It created the Public Company Accounting Oversight Board (PCAOB) to oversee the activities of the US auditing profession.

US - Securities Exchange Commission (SEC)

The stock exchanges in both states of Illinois and New York are subject to the reporting requirements of the US Securities and Exchange Commission (SEC). It monitors stock exchanges, broker-dealers, investment advisors, mutual funds, and public utility holding companies. It is also an enforcement authority and prosecutes those individuals and companies who break the security laws by insider trading, accounting fraud, false and misleading information. The SEC has only civil enforcement authority but it works closely with criminal law enforcement agencies throughout the country to develop and bring criminal cases. It can bring enforcement actions internally or in the federal courts. If a case goes to court the SEC usually asks the court to issue a prohibition order and may ask for accounting for frauds or special supervisory arrangements, and civil monetary penalties, return of illegal profits, and suspension from serving as a director or imprisonment.¹⁴⁵ Pursuant to section 108(d) of the Sarbanes-Oxley Act 2002, the SEC was mandated to undertake a study "Adoption by the US Financial Reporting System of a Principle-based Accounting System". This study, reported in the 2003 Annual Report, found that the then existing standards are a cause of poor quality financial reports.

US- Securities Exchange Commission

The regulatory organisations of a country aim to combat fraud by reducing risk through enforcement of compliance. In the US, the SEC Annual Reports contain an alarming quantity of enforcement against foreign currency fraud. An analysis of SEC Annual Reports 1999 to 2003, reveal the efficiency and necessity of its enforcement powers¹⁴⁶. As well as the Enron fraud¹⁴⁷, the WorldCom fraud¹⁴⁸, the Adelphia

¹⁴⁵ See the Securities Exchange Commission Annual Reports on its website.

¹⁴⁶ See S.Ramage, Serious Fraud and Current Issues, (iUniverse, New York, 2005) page 92.

Ramage's Analysis of SEC Reports (1999-2003)- Referrals to Division of Enforcement

	1999	2000	2001	2002	2003
Self-regulatory organisations	1	0	0	0	0
Broker-dealers	131	123	112	76	92
Investment advisors	56	54	54	48	55

Communications fraud¹⁴⁹, the Tyco fraud¹⁵⁰, and the Healthsouth fraud¹⁵¹, the SEC seems to be fighting fraud in computerised systems more than any other type of fraud¹⁵². This cannot be compared with the UK's regulatory system, the Financial

Investment companies	19	18	8	14	14
Transfer agents	15	11	12	7	9
Insurance companies	1	0	0	0	0

There were also 1473 broker-dealers with less serious deficiencies in 1999 to 2003, 3976 investment advisors with other deficiencies in 1999-2003, 703 investment companies with other deficiencies in 1999-2003, and 1038 transfer agents with other deficiencies in 1999-2003.

¹⁴⁷ Because of which, investors lost \$70 billion but sued Enron's banks and recouped a fraction of this. See J.Cresswell, "JP Morgan Chase to pay Enron investors \$2.2 billion", The New York Times, June 15, 2005. See also, J. Bailey, "CIBC pays to settle Enron case : An Agreement for \$2.4 billion", The New York Times, August 3, 2005.

¹⁴⁸ WorldCom was the United States' second largest long distance communications carrier company. It went into bankruptcy in July 2002 after an \$11 billion false accounting fraud was discovered. See K.Belson, "WorldCom Head is given 25 years for huge fraud", The New York Times, July 14, 2005.

¹⁴⁹ Adelphia Communications was the 6th largest cable company in the US, but none of its wealth was real. On June 20, 2005, its CEO was convicted of defrauding Adelphia Comm. Of hundreds of millions of dollars by perpetrating a major fraud on the investors. See R.Fazard, "Jail terms for 2 at top of Adelphia", The New York Times, June 21, 2005.

¹⁵⁰ Tyco began life in 1960 as a laboratory operating on government contracts. It became a diversified manufacturing company and employed 260,000 persons by 1999. The Chief Executive Officer was convicted of grand larceny and enterprise corruption and the Chief Finance Officer was convicted of misuse of company funds, a total fraud of \$600 million. See A..R.Sorkin, "Ex-Tyco officers get 8 to 25 years: 2 sentenced to crackdown on white-collar crime", The New York Times, September 29, 2005.

¹⁵¹ Healthsouth was the USA's largest provider of outpatient services. Healthsouth had defrauded investors, government insurers and customers and submitted false accounts and on June 9, 2005, Healthsouth agreed to pay \$100 million over a two-year period, to settle shareholder claims. See S.Romero and K.Whitmire, "Former Chief of Healthsouth acquitted in \$2.7 billion fraud", The New York Times, June 29, 2005.

¹⁵² Editor, "Internet Securities Fraud: Old Trick, New Medium", 2001, Duke Law and Technology Journal, Rev 006:

<http://www.law.duke.edu/journals/dltr/articles/2001dltr0006.html>

and

United States Government Accountability Office, "Report to the Chairman, Securities and Exchange Commission - Securities and Exchange Commission needs to address weak controls over Financial and Sensitive Data", March 2005.

and also

BytEnable, "Former Computer Associates executives plead guilty to fraud conspiracy", April 8th, 2004.

and

New York Newsday, "SEC blocks sales of unregistered securities on the internet", March 15th, 1995.

and

Services Authority newly consolidated independent system being are only a few years old¹⁵³. France¹⁵⁴ and Germany's have been recently overhauled.

Conclusion to Chapter 2

Financial regulation safeguards the economy against systemic risk. Financial markets provide a crucial source of information that helps co-ordinate decentralised decisions throughout the economy. Rates of return in financial markets guide households in allocating income between consumption and savings, and in allocating their stock of wealth. In view of these critical contributions to economic performance, the health of the financial sector is a matter of public policy concern and so governments regulate the financial sector in order to safeguard the financial system against systemic risk, protecting consumers from opportunistic behaviour, and combating organised crime. There has been recent frantic reform of financial regulation in the UK, France, and Germany due to EU merger regulation¹⁵⁵ and anti-trust enforcement rules¹⁵⁶ in part due to the entry of additional European States into the EU and primarily to the Financial Services Action Plan.

International Import Export Business Exchange, Editorial, Warning – Users of the IMEX Exchange are urged to make appropriate inquiries and seek necessary counsel before entering into any business arrangement or sending any money, or incurring any expense of any kind in relation to an advertisement or offering on the IMEX Exchange.' at website

<http://www.imex.com/imex/fraud/fraud.html>

¹⁵³ The FSA is the new consolidated independent regulatory authority of the UK, taking over from the Bank of England, which oversaw this area together with the UK's Department of Trade and Industry which oversaw insurance companies before 2001, the date the FSA came into being.

The differences between France and the UK can in part be illustrated by employees' attitude to share participations in French companies, as in the research paper by F. Degeorge, D. Jenter, A. Moel and P. Tufano, "Selling Company Shares to Reluctant Employees: France Telecom's Experience" (SSRN, 2002) - In 1997, France Telecom, the state-owned French telephone company, went through a partial privatization. The firm specificity of human capital has a negligible effect on employees' investment decisions; (2) the amount of funds invested in the stock plans seems driven by a different set of forces than the decision to participate, which we suspect reflects a "threshold effect" that we attempt to measure; (3) employees "left on the table" benefits equal to one to two month's salary by failing to participate; and (4) most participants underweighted the most valuable asset.

¹⁵⁵ Regulation (EC) No.139/2004 of January 20, 2004 on the concentrations between undertakings.

¹⁵⁶ M.Monti. "EU competition policy after May 2004", speech given in October 2003 at the Fordham Annual Conference on International Anti-trust Law and Policy, New York. – www.europa.eu.int/competition/speeches.html.

The consolidated, independent, regulatory bodies of UK, France, and Germany have been recently established. The UK has the FSA, formed after the 2000 Financial Services and Markets Act, there being previously self-regulatory organisations that covered both wholesale and retail financial services. Germany has merged its three regulatory bodies (one each for banks, insurers, and securities houses) into one Federal Agency for Financial Market Supervision, overseeing all of Germany's eight bourses. America has one Federal regulator for its securities markets – the Securities and Exchange Commission (SEC).

Most UK listed companies, about 90%, do not have a major shareholder owning more than 25%¹⁵⁷. Concentration of shareholder plus the nature of ownership differs in UK and Germany. Institutional shareholders hold most of UK company shares¹⁵⁸. Many German companies are private companies. German companies are at least 50 years old when they are floated but UK IPO's are 10 years old on average.

However, the main differences in regulatory requirement are that in a country with low protection of shareholder rights, shareholdings need to become larger. Large shareholders have an arm's length relationship with the company. Mandatory takeover thresholds make investors in the UK better protected than in countries like Germany even though the cost of control in Germany is less. There is high level of initial control in all these countries' stock exchanges but UK shareholders lose majority control sooner because the shareholdings are smaller to start with. As far as corporate fraud is concerned, those German shareholders have stronger control in these low-risk companies but in the UK where most young companies are high risk, the shareholder needs to see that the company is highly controlled which costs more. There is the equivalent to the UK Directors' Remuneration Report Regulations 2002 in the US. The changes made by these regulations entitle shareholders to vote to

See also Financial Times newspaper article, "Brussels to speed shake-up on handling merger casework", February 25, 2004.

¹⁵⁷ Becht and Meyer (2001).

¹⁵⁸ In the UK, the Company Act 1985 requires the identity of shareholders purchasing share blocks in excess of 3% to be disclosed to the target company. Shareholders owning 15% or more of the equity in a UK floated company must declare whether they intend to launch a takeover. The UK is more transparent therefore. There is a City Code on "concert parties".

approve these yearly remuneration reports¹⁵⁹. This resolution is not compulsory but advisory. The Companies (Audit, Investigations and Community Enterprise) Act 2004 intends to help investor-confidence. It gives specific protection to whistle-blowers from breach of confidence claims. In addition, this is the crux of the advantage of the UK to all other countries. Directors face criminal and civil charges. Auditors must form a view of the truth of Directors' Reports¹⁶⁰. However, the US regulations have more of an impact elsewhere than the UK regulations¹⁶¹.

English regulatory systems differ markedly with the French and German systems. In English serious fraud cases, the directors of companies, solicitors, and accountants must answer section two notices. Other UK bodies that combat fraud are the Office of Fair Trading and the Financial Services Authority. Two conditions must exist for criminal responsibility to legal persons under French law. One or more natural persons constituting either a body or representative of a legal person must first have committed the offence. French sanctions are stipulated in the Criminal Code with the maximum rate of fine applicable to legal persons equal to five times the maximum fine for natural persons. In France, natural persons who are convicted of any of fraud are prohibited from holding public office¹⁶² or undertaking any professional activity. The prison sentence and fine level go up to 5 years and 75,000 Euros, the more serious the offence.

There are no compulsory interviews for serious fraud as there are in the UK by the Criminal Justice Act 1987 section 2. As to fraud trials, France has a statute of

¹⁵⁹ Companies Act 1985, s241A.

¹⁶⁰ When the tort of negligence was used to sue auditors for a duty of care to third parties, UK courts resisted such claims. (see *Candler v Crane, Christmas & Co.* [1951] 2 KB 164, CA.). The actual nature of the damage suffered must be relevant to the extent of any duty to avoid or prevent it (see *Caparo Industries plc v Dickman* [1990] 2 AC 831, HL). In *Smith v Eric S. Bush*, the courts set out a threefold test for liability. The application of the test depended on the facts of the case (see *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2004] 2 WLR 1415, CA).

The new UK Companies Act 2006 limits this auditor liability, except when the auditor is a party to fraud. An auditor is an "officer" if he is appointed to fill the office of auditor and not merely 'ad hoc for limited purposes' (see *R v Shacter* [1960] 2QB 252) and so could have been indicted under the Theft Act 1968, section 19(1) for a false statement by a company director and other officers

¹⁶¹ L. Enriques, "Bad apples, Bad oranges: a comment from old Europe on Post-Enron Corporate Governance Reforms", 2003, *Wake Forest Law Review*, 911, 918-9.

¹⁶² J. Hodgson, *French Criminal Justice*, (Hart Publishing, London, 2006)

limitation for the prosecution of a criminal offence¹⁶³, irrespective of whether a natural person or a legal person commits the offence¹⁶⁴. In 2003, the French government issued a list of offences for which legal entities could incur criminal liability, including theft, extortion, fraud, misappropriation, money laundering and bribery. More developments meant that as from the year 2006, the French government announced that criminal liability of legal entities is now extended to all offences defined in the Penal Code¹⁶⁵ and Articles 131-37 to 131-39 Penal Code define ten types of penalty specific to legal entities, these being fine, dissolution, prohibition to exercise certain activities, placement under judicial supervision, closure of the establishment for a given period, disqualification from public tenders, prohibition to make a public appeal for funds, prohibition to draw unauthorised cheques or to use payment cards, and confiscation of the thing used or intended for the commission of the offence or of the proceeds of the offence.

The 1959 European Convention on Mutual Assistance in Criminal Matters ensures that countries afford extradition facilities to each .This Convention underpins the UK's International Co-operation Act 1990. The UK Crime (International Co-operation) Act 2003 allows overseas freezing orders to be given effect regardless of the nature of the authority making the order in a participating country , and avoids “fishing expeditions”, using section notices, these being contrary to article 6(1)¹⁶⁶ of the European Convention on Mutual Assistance in Criminal Matters¹⁶⁷.

¹⁶³ Ibid 111. Article 8 of the Criminal Procedure Code.

¹⁶⁴ Ibid 11. In the history of French law, the criminal liability of legal entities has been acknowledged since the Criminal Ordinance of 1670. Criminal liability of legal entities was reintroduced, (after being removed in the 1810 Penal Code) in the 1994 Penal Code and Article 121-2 of the 1994 Penal Code states: “Legal persons, with the exception of the State, are criminally liable for the offences, provided for by statute or regulation”.

¹⁶⁵ Ibid 111.

¹⁶⁶ Article 6(1) of the European Convention on Mutual assistance in Criminal Matters states that the requested Party may delay the handing over of any property, records or documents requested, if it requires the said property, records or documents in connection with pending criminal proceedings.

The Crime (International Co-operation) Act 2003 (Commencement No.3) Order 2006 (SI 2006 No.2811) now applies across the UK. It brings into force sections 32-36 and section 42-46, making further provisions for the UK to carry out mutual legal assistance in relation to financial information.

The Enterprise Act implements the EU Market Abuse Directive 2003/6/EC and makes for a widened Part VI of the Financial Services and Markets Act 2000¹⁶⁸. The Enterprise Act sought to increase the incidence of corporate rescue in the UK and to improve outcomes for creditors of insolvent companies, but has not proved effective.¹⁶⁹

Germany has criminal sanctions and a general offence of fraud¹⁷⁰.

The reforms that have created the AMF, SEC, BaFin and FSA as central financial regulatory agencies in these countries are different in many respects and they have all included changes in financial regulations and supervisory standards, leading the way for other less developed countries, even though France and Germany¹⁷¹ are bank-based financial systems¹⁷² and the UK and USA are market-based financial systems.

The role and power of regulators in France, Germany, US and the UK can be set out as follows

Role and Power of Regulators

Regulator	France- Autorite des Marches Financiers [AMF]	Germany- Bundesanstalt fur Finanzdienstleistungs- aufsicht	US- Securities Exchange Commission	UK- Financial Services Authority
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¹⁶⁸ Market abuse is as a civil offence, punishable by fines, and administered by the Financial Services Authority, the UK financial regulatory agency.

¹⁶⁹ S.Frisby, Corporate rescue, (Hart, London, 2006).

¹⁷⁰ Website of the Federal Ministry of Justice, Germany.

¹⁷¹ The German securities market trades mostly for Germany and this is because there is lack of foreign investor interest in the German market due to cost of transactions, and lack of confidence and knowledge in Germany's sectoral governance.

¹⁷² Allen and Gale (1999) and Levine (1999).

1. Guided by underlying policy considerations?	Yes	Yes	Yes	Yes
2. Obligations to self-report regulatory breaches?	No	No	Yes	Yes
3. Entitled to prosecute criminal offences?	No	No	Yes	Yes
4. Order compensation for those suffering losses because of regulatory breaches?	No	No	No	Yes
5. Able to assist and share info with foreign regulators?	Yes	Yes	Yes	Yes
6. How does regulator conduct investigation?	Order an inspection or open an investigation.	Formal request for information and documents.	Opens .Investigation	Appoints an investigator.
7. Compulsory disclosure to regulator?	Yes	Yes	Yes	No
8. Compulsory communications with regulator's lawyers?	Yes	Yes	Yes	Yes
9. Compulsory disclosure of evidence by regulator?	Yes	Yes	Yes	Yes

10. How is decision made?	Rapporteur will present his conclusion in a report.	In an administrative procedure which is not public.	Report after investigation.	Regulatory Decisions Committee.
11. Duration of typical enforcement action?	15 to 24 months	Depends	Depends	10 to 11 months.
12. Is it possible to settle an investigation?	No	No	Yes	Yes
13. Does the investigated company pay for the cost of the regulator's investigation?	No	Yes	No	Yes
14. Will the regulator make it public?	No	No	No	Yes
15. Does the regulator commence enforcement proceedings?	Depends	Yes	Yes	Yes
16. How active is the regulator?	Very	Very	Very	Not enforcement led.
17. Does regulator have enforcement priorities?	No	Market manipulation and insider dealing	No	Management responsibility; market abuse, insider dealing, conflicts of interest.
18. What is the range of sanctions?	Warning or fine	Warning or fine or cancel licence	Public Warning or fine and/or	Private Formal warning or

			imprisonment of directors	fine
19. Will there be third party actions?	Yes	Yes	Yes	Possible
20. Is there a right to appeal?	Yes	Yes	Yes	Yes
21. Will the legal proceedings be public?	Yes	Yes	Yes	Depends

(Sources- Freshfields website; www.freshfields.com; website of BaFin www.bafin.de; FSA website www.fsa.gov.uk; SEC website www.sec.gov; AMFwebsite www.amf-france.org)

CHAPTER 3 - BRIBERY AND CORRUPTION

Bribery and Corruption Overview

Throughout the world, bribery and corruption is classed as serious fraud, so much so, that there are many international conventions on 'Bribery and Corruption'¹⁷³. Examples of bribery and corruption are active bribery, passive bribery, embezzlement, or misappropriation of public funds, trading in influence, illicit enrichment, and money laundering. If bribery is outlawed, companies worldwide will look for other means of exercising influence, whether legitimate or controversial.

UK & International - Money Laundering (FATF)

Money laundering¹⁷⁴ has been agreed as the processing of criminal proceeds in order to disguise their illegal origin. To stop money laundering is directly to stop future criminal activity from affecting legitimate economic activities. The FATF has compiled a list of countries which are not co-operative (NCCT's) and it publishes and maintains this list in its detailed and public annual report. The FATF puts countries on this list if they fail through inadequate or no supervision of offshore banking, if they do not have strict bank secrecy laws, if they have no suspicious transaction reporting system, if they have no requirement that the effective owners of companies be identified and an absence of mutual legal assistance provision.

¹⁷³ See United Nations Convention Against Corruption 2003; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions 1997; African Union Convention on Preventing and Combating Corruption 2003; Council of Europe Criminal Law Convention on Corruption 1998; Council of Europe Civil Law Convention on Corruption 1999; and the Inter-American Convention Against Corruption 1996.

¹⁷⁴ The Third Money Laundering Directive was published in July 2006. It includes extended supervision so that all businesses in the regulated sector comply with money laundering requirements, including estate agents, trust and company services providers and unsecured lenders; extra checks on high-risk customers; a requirement to establish the source of wealth for those in high risk situations and a new regime in casinos, stricter than international standards. The draft Regulations can be found

at:http://www.hm-treasury.gov.uk/media/4EC/49/consult_thirdmoney_2007.pdf and the public consultation is open until 2 April 2007. The Regulations are intended to come into force by December 2007.

UK Proceeds of Crime Act 2002

Part 7 of the Proceeds of Crime Act contains definitions of money laundering. A person commits an offence by concealing, disguising, converting or transferring criminal property. Criminal property is that which is had from criminal conduct or that which represents the benefit from criminal conduct and the offender knows or suspects that it constitutes or represents such a benefit. No offence is committed if the person concerned makes a timely disclosure of the facts to the police, a customs officer or a person nominated for the purpose by the person's employer. It is also an offence to acquire, use or have possession of criminal property.

UK & International - OECD Convention 1997

The Convention¹⁷⁵ requires the Parties to outlaw, in their domestic laws, acts of bribery committed by their nationals or committed in their territory and directed towards the public officials of another foreign state. The Convention also requires that the Party bribing a foreign public official be punished by effective, proportionate and dissuasive criminal penalties comparable to those that apply to their own public officials. The Convention requires Parties to regulate accounting and record keeping and impose effective and dissuasive penalties for omissions and falsifications in accounts, records, financial statements, and similar reports.

Germany has its 1998 Anti-corruption Act and the UK has its 2002 Anti-Bribery Act. In 2002, a survey of six countries including the US, UK and Germany¹⁷⁶ showed that UK companies emerged as the most sensitive to corruption risks and the survey showed that 48% of British companies studied had stayed away from otherwise attractive investments on account of corruption, compared with 42% of the US companies and 40% of German companies. The survey showed that 94% of UK

¹⁷⁵ See H.Williamson and M.Peel, "Nations shamed over bribery", Financial Times, 27.6.06. "Most industrial nations are failing to live up to their own political promises on fighting corporate bribery abroad, according to a new survey by Transparency International. .19 of the 31 signatories surveyed had taken little or no action to enforce the convention. In the UK, Japan and the Netherlands there has not been a single prosecution under the Convention, while in the US there have been 50 and in Hungary 22, according to TI..."

¹⁷⁶ The Control Risks Corruption Survey 2002. Control Risks is a leading international business risk consultancy.

companies and 92% of US companies have company codes to forbid the payment of bribes to secure business¹⁷⁷.

UK & International – UN Convention against Corruption 2003

From the legal perspective, corruption is “the act of doing something with intent to give some advantage inconsistent with official duty and the rights of others.” Corruption is characterized by the misuse of public power for private gain. It is usually categorized as private or public, bureaucratic or political, isolated or systemic.

Despite the initial reluctance of the international community to adopt penal measures against corruption the anti-corruption Conventions was the culmination of talks. The Convention prohibits a wide range of corruption namely domestic and foreign bribery, trading in influence,¹⁷⁸ embezzlement,¹⁷⁹ abuse of functions,¹⁸⁰ and illicit enrichment.¹⁸¹ The Convention also provides for preventive and control measures against money laundering,¹⁸² mutual assistance in inter-State cooperation,¹⁸³ and

¹⁷⁸ Article 18 (“Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally: (a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act or for any other person; (b) The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage”).

¹⁷⁹ Article 17 (“Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position”).

¹⁸⁰ Article 19 (“Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity”).

¹⁸¹ Article 20 (“Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income”).

¹⁸² Articles 14, 23 and 52.

recovery of assets.¹⁸⁴ and Articles 51 and 57 of the Convention recognize the right of victim States to the repatriation of recovered proceeds.¹⁸⁵

UK Prosecution of Bribery and Corruption

The capacity of each State to prosecute offences is limited by its jurisdiction.¹⁸⁶ Under the territoriality principle of jurisdiction, a State assumes jurisdiction to prosecute an offence that wholly or substantially takes place in its territory.¹⁸⁷ By prohibiting some forms of domestic corruption,¹⁸⁸ every State exercises territorial jurisdiction to prosecute offenders.

The United Nations Convention Against Corruption (UNCAC) authorizes each State Party to exercise jurisdiction over offences on the bases of territoriality¹⁸⁹ and nationality principles, and of the protective principle.

Extradition provisions, the traditional means of enabling non-victim States to assist victim States in the prosecution of offenders,¹⁹⁰ are covered by Article 44 of the Convention. Where an offender who committed a prohibited conduct in a foreign country is present in his country of nationality, the *aut dedere aut judicare* (extradite or prosecute) rule in Articles 42(3) and 44(11)¹⁹¹ can be argued to constitute an

¹⁸³ Article 46.

¹⁸⁴ Articles 31, 53-55.

¹⁸⁵ See Alan Perry, "Corruption and Forward Business Planning: The United Nations against Corruption and what it means," p. 8 (Kendall Freeman, January 2005) (noting that the provisions on the recovery and repatriation of assets are of particular interest to new and developing States).

¹⁸⁶ International law recognizes five principles upon the basis of which a State may exercise jurisdiction: territoriality, active nationality, passive nationality, protective principle and universality. See Ilias Bantekas & Susan Nash, *International Criminal Law* (London: Cavendish Publishing Limited, 2nd Edition, 2003) 143 and U. O. Umozurike, *Introduction to International Law* (Ibadan: Spectrum Law Series, 2nd Edition, 1993) Chapter 7.

¹⁸⁷ See S. 402 of the American Law Institute, *Restatement (Third) of Foreign Relations Law of the United States* (US: American Law Institute, 1987).

¹⁸⁸ See *supra* note 16. See also John T. Noonan, Jr., *Bribes* (USA: Macmillan Publishing Company, 1984) 702 and Peter J. Henning, *supra* note 5, p. 793 n.2.

¹⁸⁹ Article 42(1) (a) & (b).

¹⁹⁰ Since there is no general rule in international law which requires a State to surrender fugitive offenders (Ilias Bantekas & Susan Nash), extradition arrangements constitute the media for the rendition of fugitives amongst States.

¹⁹¹ It provides: "A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground

insurance against his impunity. In the case where an offender is present in a country other than the country of his nationality, Article 42(4)¹⁹² provides that the custodial State may take such measures as may be necessary for it to prosecute him where it refuses to extradite him to the country in which the offence was committed. Traditionally, the existence of a link between a State and an offence constitutes a good justification for its exercise of jurisdiction.¹⁹³ This is adopted by the Convention in its express restriction of the bases of jurisdiction to the principles earlier enumerated. Consequently, the State that is directly affected by the crime has the sole jurisdiction to prosecute offences. Article 44(4) of the Convention enhances the extradition process by requesting each State Party not to consider the offences established by the Convention as political offences.

The Convention localizes the remedy through its commitment to the principle of sovereignty.¹⁹⁴ Two presumptions underlie the approach of the Convention, namely, that corruption is fostered essentially by the lack of, or inefficiency of appropriate national legal regimes; and second, that all types of corruption are invariably of the same character. In the context of globalization, corruption is recognized as a transnational crime¹⁹⁵ that affects non-victim States because of its symbiotic relationship with organized crimes¹⁹⁶ such as illicit arms trade, international drug

that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution....”

¹⁹² It provides: “Each State Party may also take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite him or her.”

¹⁹³ Kenneth C. Randall, “Universal Jurisdiction under International Law” (March 1988) 66 Texas Law Review 785 at 786-788; Ilias Bantekas & Susan Nash and Tom Vander Beken “The best place for prosecution of international corruption cases: Avoiding and solving conflicts of jurisdiction,” p. 4 (The Third Global Forum on Fighting Corruption and Safeguarding Integrity Workshop I {Legal Instruments – Bribery}: Seoul, 29 May 2003).

¹⁹⁴ See Article 4.

¹⁹⁵ According to Article 3(2)(a)&(d) of the United Nations Convention Against Transnational Organized Crime (UNCATOC) of 2000 (A/55/383, adopted on 15 November 2000 and entered into force on 29 September 2003), a crime is transnational if, as appropriate, it is committed in more than one State, or committed in one State but has substantial effects in another State. See also the 4th Preamble to the UNCAC.

¹⁹⁶ Organized crime is “the operations of two or more persons who combine to obtain financial advantages or special privileges by such unlawful means as terrorism, fraud, corruption of public officers or by a combination of such methods.” See Michael Woodiwiss, “Transnational Organized Crime: The Strange Career of an American Concept” in Margaret E. Beare (ed),

trafficking and money laundering¹⁹⁷ and because of the inverse relationship between corruption and development¹⁹⁸. The protective principle of jurisdiction¹⁹⁹ may, it can be argued, enable a non-victim State to indirectly help the victim State in the prosecution of an offender.

Article 30(2) of the Convention obliges each State Party to establish or maintain a balance of any immunity or jurisdictional privileges accorded its public officials for the performance of their functions and the possibility of effectively investigating, prosecuting and adjudicating offences.

The Convention has not created new offences; it is merely declaratory of pre-existing offences. Article 20 subjects its implementation to the constitution and the fundamental principles of each State Party.

The State possesses the sole capacity to conduct international relations through several media, including mutual legal assistance in the recovery of assets. Article 13(1) of the UNCAC requires each State Party to involve non-governmental actors²⁰⁰ in the prevention and control of corruption and money laundering. Where the requested State establishes the illicit provenance of the assets, it could seize, freeze, confiscate or forfeit them without prejudice to the rights of third parties.

Critical Reflections on Transnational Organized Crime, Money Laundering, and Corruption (Toronto: University of Toronto Press, 2003) 16. See also Dimitri Vlassis, "The Negotiation of the Draft United Nations Convention Against Corruption" (December 2002) 2: 1 Forum on Crime and Society 153 (noting that the nexus between corruption and transnational organized crimes was the rationale for the inclusion of anti-corruption provisions in Articles 8 and 9 of the UNCATOC of 2000).

¹⁹⁷ See the Preamble to Resolution 1992/50, *supra* note 68.

¹⁹⁸ See John Mukum Mbaku, "Bureaucratic and Political Corruption in Africa" in John Mukum Mbaku (ed), *supra* note 74, pp. 68-77; Kempe Ronald Hope, Sr, "Corruption and Development in Africa" in Kempe Ronald Hope, Sr, & Bornwell C. Chikulo (ed), *supra* note 98, pp. 23-27; and Robin Theobald, *supra* note 75, pp. 125-130. The Situation Assessment Analysis published by Nigeria's National Planning Commission (NNPC) and the UNICEF links the relationship between the incidence of corruption and poverty: Paul D. Ocheje, "Refocusing International Law on the Quest for Accountability in Africa: The case against the 'Other' Impunity" (2002) 15 *Leiden Journal of International Law* 749 at 758.

¹⁹⁹ It holds that every State is vested with the power to exercise jurisdiction over offences that are prejudicial to its security and other economic interests. See Michael Akehurst, *A Modern Introduction to International Law* (London: George Allen & Unwin Ltd, 2nd Edition, 1971) 131. See also Article 42(2) (d) of the UNCAC.

²⁰⁰ Even before the adoption of the Convention, private actors have been active in anti-corruption campaigns {see, for example, Transparency International (TI), a leading non-governmental anti-corruption organization and anti-money laundering initiatives {see, for instance, Wolfsberg Standards at <http://www.wolfsberg-principles.com/standards.html>.

In its law against corruption of domestic officials, there has not been a single prosecution in 90 years. Yet, the OECD survey found that British companies are among the worst offenders for bribing foreign officials. “Some 37 of the 55 companies which the World Bank publicly blacklists and has disbarred from participating in its contracts because of evidence of corruption are domiciled in Britain.” At present in the UK, the principle statutes dealing with bribery are the Public Bodies Corrupt Practices Act 1889²⁰¹, the Prevention of Corruption Act 1916²⁰², Part 12 of the Anti-Terrorism, Crime and Security Act 2001, the Proceeds of Crime Act 2002²⁰³ and the common law offence of bribery²⁰⁴.

The core rationale for the UK law then in 1889, as today, is clear, namely to prevent corruption from enabling a public official to abuse his or her position, and to prevent a party from using corruption to obtain an advantage in the UK.

²⁰¹ In section 4, Public Bodies Corrupt Practices Act 1889, “corruptly” is defined as ‘not “dishonestly” but purposely doing an act which the law forbids as tending to corrupt’.

²⁰² Prevention of Corruption Act 1916, s.2- Presumption of corruption in certain cases- “Where in any proceedings against a person for an offence under the Prevention of Corruption Act 1906, or the Public Bodies Corrupt Practices Act 1889, it is proved that any money, gift, or other consideration has been paid or given to or received by a person in the employment of [Her] Majesty or any Government Department or a public body by or from a person, or agent of a person, holding or seeking to obtain a contract from [Her] Majesty or any Government Department or public body, the money, gift, or consideration shall be deemed to have been paid or given and received corruptly as such inducement or reward as is mentioned in such Act unless the contrary is proved.”

²⁰³ Section 77 Proceeds of Crime Act 2002 defines “tainted goods”. A gift is regarded as tainted if it was made by the defendant at any time from the first day of the period of six years ending with the day when proceedings for the offence concerned were started against the defendant, that is, if the assumption is that the defendant had a criminal lifestyle. This area of law is developing. See Y.J.Listokin, “Paying for Performance in Bankruptcy: Why CEOs Should be Compensated with Debt”, (2006), Yale Law School, Bepress Legal Series. The Article proposes a novel bankruptcy compensation plan – debt compensation—that provides better incentives for managers to perform efficiently. By granting managers a fixed proportion of unsecured debt in the bankrupt firm, debt compensation creates value-enhancing incentives similar to the incentives created by the stock grants and stock options that are heavily employed by solvent firms. This can be incorporated into the PACA.

²⁰⁴ Where a person in the position of trustee to perform a public duty takes a bribe to act corruptly in discharging that duty, it is an offence in both parties: R. v. Whitaker[1914] 3 K.B. 1283,10 Cr.App.R. 245, CCA. Those involved in the administration of justice can commit bribery, such as a juror as in

R. v. Young(1801) 2 East 14 at16), a justice, as in R. v. Gurney(1867) 10 Cox 550), or a coroner, as in R. v. Harrison(1800) 1 East P.C. 382), bribery of a privy counsellor: as in R. v. Vaughan(1769) 4 Burr. 2494. Also, the offer of a bribe is an attempt to bribe, as in R. v. Vaughan, ante. The purchase and sale of public offices is said to be regarded by the common law as bribery.

The UK now has the Enterprise Act 2002, which regulates competition in the UK. The offence is extraditable and it is possible for individuals to be extradited to the UK from countries that also apply criminal sanctions to the same activities. The Serious Fraud Office can institute criminal proceedings as well as the Office of Fair Trading and compulsory interviews, as per the Criminal Justice Act.

The prosecution of insider trading in the UK has not been successful until recently, the latest of these being R v Spearman²⁰⁵ in which four defendants were charged with a single count of conspiracy to contravene the provisions of Section 52 of the Criminal Justice Act 1993 contrary to Section 1(1) of the Criminal Law Act 1977 of conspiracy to commit 'insider dealing'²⁰⁶. A person convicted of "insider dealing" may be disqualified from acting as the director of a company, as in R. v. Goodman²⁰⁷.

UK & International - Mutual Legal Assistance

The Model Treaty does not apply to extradition, enforcement of criminal judgements and transfer of persons in custody to serve sentences, or to the transfer of proceedings in criminal matters. The United Nations Model Treaty specifically permits provision of copies of bank, financial or corporate or business records; the secrecy of banks and similar financial institutions is not to be used as a sole ground for refusing assistance. The European Evidence Warrant adopts the bank secrecy rules but failed to adopt the documentary evidence from legal persons as in the UN Model Treaty.

The European Convention on Mutual Assistance adopts some of the UN Model Treaty, the main provision of which is to be found in article 7, which states that "*the Parties shall afford one another, pursuant to this article, the widest measure of*

²⁰⁵ R v Spearman, Smith and Payne [2004] unreported.

²⁰⁶ Investigations into insider dealing are also carried out by the International Stock Exchange (ISE) and prosecutions may be carried out by the ISA except where s 434(5) Companies Act 1985 applies. It is noted that the ISE played no part in the Guinness case.

²⁰⁷ 97 Cr.App.R. 210, CA

mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to criminal offences established in accordance with article 3(1).”

A requisite for seeking assistance is that “an offence has been committed or that there are reasonable grounds for suspecting that an offence has been committed and proceedings in respect of the offence have been instituted or the offence has been investigated”²⁰⁸.

A letter of request asking for assistance is then sent to the requested state by designated prosecuting authorities such as the Serious Fraud Office or the Crown Prosecution Service. The procedure is specified in the Criminal Justice (International Co-Operation) Act 1990. Section 7 of the Act enables police to search for and seize material relevant to an overseas investigation.

The UK Serious Fraud Office (SFO) has the unique power of section 2 of the Criminal Justice Act 1987, which is to allow them to compulsorily interview suspects on pain of contempt of court and instant imprisonment²⁰⁹. Section 2 of the Criminal Justice Act 1987 contains provisions where, not police, but lawyers and accountants in the Serious Fraud Office, question suspects after giving a written notice that they must answer questions about an investigation at a specified time and place or immediately. It is to be noted that since the decision in Saunders v United Kingdom²¹⁰ such compulsory statements cannot be used to incriminate oneself in court.

Apart from investigating UK cases using these powers, the SFO also uses its special powers for compulsory interviewing of suspects to assist agencies in other countries. A reservation of the right to refuse assistance if the person concerned has been convicted or acquitted of an offence based on the relevant conduct in the United Kingdom or in a third state. A reservation of the right not to apply Article 21¹, dealing with information in respect of proceedings.

²⁰⁸ Section 3, Criminal Justice (International Co-operation) Act 1990.

²⁰⁹ S.Ramage, “They can be serious”, July 2004, Accounting Technician.

²¹⁰ Saunders v UK (case 43/1994/490/572) [1998] 1 BCLC 362

The SFO requires specific requests for which they use the Section 2 Notices in this respect. An overseas authority must first make a request for assistance to the United Kingdom's Central Authority at the Home Office. In serious fraud cases, the requests go to the Serious Fraud Office. The Criminal Justice Act 1990 allows the SFO to give this assistance. Other countries cannot use the SFO's section 2 Notices for vague requests.

This was made clear in the case of R v Secretary of State for the Home Department, ex parte Fininvest SpA²¹¹. In this case, the request concerned illicit payments to politicians, ie, bribery. The Home Secretary took the view that the payments referred to were offences of bribery and corruption and not of false accounting nor of use of monies for criminal purposes. The Divisional Court upheld his decision, saying that it was for the requested state, the UK, to decide the nature of the offence and not the requesting state.

In contrast, in the case of R v Andrew Regan²¹², the media²¹³ perceived this serious fraud prosecution to be politically motivated because Andrew Regan attempted to buy out the UK's Co-operative Wholesale Ltd., a business that is Europe's largest mutual business and a company with a very long political and socialist history. The UK's Serious Fraud Office issued an international arrest warrant based on theft by Mr Regan, rather than bribery and corruption, which, if pursued, would have been

²¹¹ R v Sec of State for the Home Dept, ex parte Fininvest SpA [1997] 1 WLR 743 (DC)

²¹² R v Andrew Regan [2003] unreported.

²¹³ Jon Ashworth's article in The Times Newspaper 7 August 2003 and article in Telegraph Newspaper by Philip Aldrick 11 August 2003 and 17 April 2002 and article in Guardian Newspaper by Ben Wootliff 10 August 2003 and article by Charles Leadbetter in the New Statesman 19 March 1999.

refused in line with Article 2²¹⁴ of the European Convention on Mutual Assistance and in line with the UK's own decision in the *Fininvest* case²¹⁵.

Until March 2003, the UK refused to assist other countries if the UK considered that execution of the request is likely to prejudice the sovereignty, security, public order or other essential interests of the UK, as per Article 2. However, the UK extended this to include the protection of the economic interests through its 2003 Crime (International Co-operation) Bill. This is now an Act and implements various pieces of legislation at European level relating to mutual legal assistance in criminal matters, police co-operation, mutual recognition of penalties and terrorism.

The UK's Serious Fraud Office has new powers under the Enterprise Act 2002. The Act introduces widespread changes to competition regulation in the UK. It is now a criminal offence for individuals to dishonestly enter into cartel agreements. The offence is extraditable, so that it will be possible for individuals to be extradited to the UK from countries that also apply criminal sanctions to the same activities and individuals may be extradited from the UK to face similar charges.

Criminal proceedings may be instituted by, with the Office of Fair Trading, or by the Director of the Serious Fraud Office and the SFO will be able to use its Section 2 powers as often as it wishes in every case. After publishing consumer and business 'guides' on the application of these powers in 2005, in 2006 the UK's Office of Fair Trading (OFT) set about using these powers. The OFT reported that it opened 23 cases involving possible cartel activity and launched formal investigations in relation to seven cases where it had reasonable grounds to suspect a cartel infringement had occurred. The 2006 OFT Annual Report states that it conducted 92 on-site

²¹⁴ Article 2 of the European Convention on Mutual Assistance in Criminal Matters states:

“ Assistance may be refused:

if the request concerns an offence which the requested Party considers a political offence, an offence connected with a political offence or a fiscal offence;

If the requested Party considers that execution of the request is likely to prejudice the sovereignty, security, ordre public or other essential interests of its country.”

²¹⁵ R v Sec of State for Home Dept, ex parte Fininvest SpA [1997] 1 WLR 743 AC, HL.

inspections in seven cases, some of which were carried out using its criminal enforcement powers, in conjunction with the Serious Fraud Office.

UK and European Evidence Warrant

The European Arrest Warrant applies to persons and the European Evidence Warrant applies to evidence objects, documents, medical records and data. Its aim is to supplant the 1959 European Convention on Mutual Assistance in Criminal Matters, certain rules in the 1990 Schengen Convention and in the 2000 European Union Convention and its 2001 Protocol and the 1984 Vienna Convention. It is to be noted that the UK did not ratify the Vienna Convention until June 1991.

It will be used to obtain evidence that already exists, not to gather new evidence. For example, it will not be used to request an authority to take a DNA sample from somebody, to interview a witness for a crime, to commission an 'expert report', to intercept communications or to monitor someone's bank account. In the case of bank details, the Evidence Warrant will be used to ask for bank records but only if the account details such as number and name are already known. Unlike the Mutual Assistance Request, which can be used by defence lawyers as well as prosecutors, only a judge, investigating magistrate or prosecutor, must always issue the Evidence Warrant. The Evidence Warrant will have legal, medical and journalistic privileges.

The European Evidence Warrant was mooted since the 1990's as an aid to the investigation and prosecution of fraud and money laundering offences, the success of such prosecution is largely dependent on treaties and conventions. In such offences, witnesses and documentary evidence are to be found in a number of different jurisdictions.

The UK can already use evidence collected abroad through sections 23 to 25 of the Criminal Justice Act 1988, which allows evidence of a witness abroad to be produced in evidence if it is not practicable to secure the attendance of the witness. This Evidence Warrant will especially be useful to combat cyber crimes by addressing the jurisdictional issues that arise where a business holds computer data

about its customers in one Member State on a server located in another Member State.

France- Corruption

Recently, France has become increasingly involved in international organisations that address the matter of fraud and corruption. these activities ranging from the 1994 World Ministerial Conference on Transnational Organised Crime to the 2001 Global Forum on the fight against corruption as well as the OECD work to combat corruption.

Similar to the OECD's report on the Corruption Convention's implementation in Germany, is the 2004 OECD's report on the Convention's implementation in France. France has adopted the anti-corruption articles by implementing them into its Criminal Code in 2000. French Penal Code Article 432-11 states:

“Passive corruption and Trafficking in influence by persons holding office. The direct or indirect request or acceptance without right of offers, promises, donations or advantages, when done by a person holding public authority or discharging a public service mission by a person holding a public electoral mandate, is punished by ten years' imprisonment and a fine of E 15, 000 where it is committed:

1. to carry out or abstain from carrying out an act relating to his office, or mandate, or fact of his office, duty or mandate;
- 2 or to abuse his real or alleged influence with a view to obtaining from any public body or administration a distinction, employment, contract or any other favourable position.”

The Public Prosecutor has sole authority to prosecute in specific cases of corruption. The OECD found that the Prosecutor rarely prosecutes if the information came from an anonymous informant or by press revelation and if an employee reports business related offences these are regarded as laying information with malicious intent.

The OECD Report recommends that France adopt “*stronger protection measures that would enable employees of private companies to disclose suspected acts of transnational bribery without fear of being dismissed or sued*”.

France - Money Laundering

Article 324-1 and article 324-2 of the French Penal Code²¹⁶ make it an offence to launder the proceeds of crime including money derived from active bribery of foreign public officials.

Article 324-1 states:

“Money laundering is facilitating by any means the false justification of the origin of the income of the perpetrator of a felony or misdemeanour which has brought him a direct or indirect benefit. Money laundering also comprises assistance in investing, concealing or converting the direct products of a felony or misdemeanour. Money laundering is punished by five years imprisonment and a fine of Euros 375, 000. Article 324-2 states that money laundering where it is committed by an organised gang is punished by ten years imprisonment and a fine of Euros 750, 000.”

France’s Monetary and Financial Code stipulates that Financial organisations must draw up and retain information regarding the identity of their clients and the transactions they have effected for a period of five years. France has a specialised unit to deal with money laundering called TRACFIN, Unit for Intelligence Processing and Action against Secret Financial Channels.

The OECD Report on France states that in January 2004, France had six potential cases of bribery of foreign public officials, which include money laundering. France has an Audit Court, like the UK’s National Audit Office, which monitors the use of public funds by public institutions and public enterprises. France also has a Banking Commission, which is responsible for overseeing 2,600 financial establishments.

²¹⁶ Translation of the French Penal Code is as per the Legifrance website, translated with the participation of Professor John Rason Spencer, University of Cambridge, Selwyn College, UK.

France has a similar organisation to the UK's Serious Fraud Office, this is called OCRGDF, the Central Office for Fighting Major Financial Crime, and this is especially interested in targeting money laundering. It also has 900 criminal police officers who specialise in economic and financial crime. The report stated that although France has fraud offences for legal persons²¹⁷ as well as natural persons, the courts are slow to prosecute legal persons²¹⁸, very like the situation in the UK.

Germany – Corruption

Companies and associations are aware that bribing a foreign public official is now illegal in Germany. Companies with extensive internal controls designed to detect bribery, generally deal with offenders internally. Many compliance codes warn employees that criminal prosecution may result from bribe-related activity.

Many businesses have developed codes of conduct, and due to developments in capital markets and changes in perceptions of shareholder protection, these codes are assuming growing importance. The businesses with such codes tend to be medium and large companies.

The German government maintains close links to private sector business associations that have developed guidelines regarding corporate codes of conduct. The most recent example is the German Corporate Governance Code of Conduct, issued by a government-chartered commission that examined conduct of supervisory and management boards of companies quoted on the German stock exchanges.

Germany now has an Administrative Offences Act, which establishes the liability of legal persons, including liability for the foreign bribery offence. The Act provides not only administrative fines for legal persons but also sanctions for administrative offences committed by natural persons. The German authorities emphasise that the imposition of administrative fines for legal persons under the Administrative Offences Act is an incidental consequence of an offence for the natural person.

²¹⁷ Article 222-16-1, inserted in June 2001 states that legal persons may incur criminal liability by way of fines.

²¹⁸ An example of a prosecution of a legal person was the case Cass. Crim 24 May 2000. The case concerned the use of forged attestations in the course of judicial inquiry.

Under German public procurement law, a company can be excluded from public contracts for bribing domestic or foreign officials on the ground of ‘*unreliability*’. At the Land or municipal level, several jurisdictions (for example, Hesse) establish corruption registers and have excluded corrupted companies from public contracts thereby. The right to remain silent is therefore maintained. As to its government, members of Parliament in Germany have immunity from prosecution, although this can be abrogated in cases such as tax evasion.

As recent as 2003, a German lobbyist was convicted of accepting 24 million Euro bribe from a French oil company, because, although Germany does not yet have a defined offence of corruption, there is the offence of exploitation of advantages (*Vorteilsnahme*), fraud (*Betrug*) and bribery. As to mutual legal assistance, a request for such assistance addressed to Germany by a Member State but Germany will not carry out searches for evidence.

US Corruption

For nearly thirty years from 1977, the US was the only country with a Foreign Corrupt Practices Act empowering its courts to prosecute US companies for paying bribes abroad²¹⁹. However, in 1997 the OECD countries signed an anti-bribery convention whereby member states promised to introduce similar legislation. The OECD Convention mirrors the US’s Foreign Corrupt Practices Act (FCPA) largely. The FCPA consists of two independent sets of provisions:

1. *Anti-bribery provisions*.-Non-US nationals who are employed by or act as agents for US companies are subject to criminal as well as civil penalties.
2. *The collateral estoppel rule* dictates the way that two offences can be tested to see if they are the same offence. This rule arose from the case Ashe v Swanson and the requirements are an acquittal, on a factually related offence, based on an essential element in both offences.

In 2004, nearly 27 years after the US’s FPCA to deal with foreign bribery, the US seems to determine what it deems to be bribery in a different way to the UK’s

perception of bribery²²⁰. The corporate scandals such as the 2001 collapse of Enron must not be forgotten and in analysing the case, we can learn from it.

Conclusion to Chapter 3

The various state laws and practice vary enormously. Some of the key anomalies include:

- the absence of any uniform definition of corruption;
- Statutory immunity from prosecution to officials, which might extend to corruption.

There is no uniform monetary sanction prescribed which might lead to forum shopping. However, the Convention against Bribery and Corruption addresses active and passive corruption, which is good. In addition, it addresses transnational bribes and bribery of private persons in a commercial context as well as the act of trading in influence. In France and Germany, bribery is already a criminal liability under the EU Criminal Law Convention on Corruption 1998.

²²⁰ Washington Post, May 19, 2004, said that lobbyists in 41 US states spent \$889 million wining, dining and influencing state lawmakers in 2003 and spent \$720 million in a similar way in 2002.

CHAPTER 4 - RIGHT TO SILENCE

Right to Silence Overview

The privilege can be traced to the 12th century and became more developed in the following centuries. The Latin term “*nemo tenetur prodere seipsum*” remains in use. It was applied on the Continent before the age of Codification. The Magna Carta 1215²²¹ was as dear to the lawyers as to the clergy. This produced arguments that writs should issue to keep the ecclesiastical courts from requiring defendants answering incriminating questions.

UK Right to Silence

It can be argued that the specific protections embodied in the UK’s Police and Criminal Evidence Act 1984 give advantage to the suspect. The UK’s PACE is similar to the criminal procedure of the USA with its landmark judgement in Miranda v Arizona²²². The balance of power between prosecution and defendant has shifted in favour of the defendant even though the right to silence during a police interview can be brought to the attention of the jury if a case were to be brought against the suspect. The Police and Criminal Evidence Act has attached to it Codes of Practice for the police to adhere to. These Codes were issued under section 66 of the Police and Criminal Evidence act 1984. The Codes cover the detention, treatment and questioning of suspects by police officers and include access to legal advice, time limits for detention and conditions in which suspects may be questioned. Special provision is made for vulnerable groups such as people with learning difficulties and juveniles²²³. Under the Judges’ Rules, insufficient consideration was given to these suspects²²⁴, but PACE has improved the position of juveniles and suspects with learning disabilities²²⁵. Breaches of the Codes may be taken into account if the court thinks that they are relevant to any question arising in the

²²¹ The text of the Magna Carta mostly deals with specific grievances rather than with general principles of law. Clause 38 states, “No official shall place a man on trial on his own unsupported statement, without producing credible witnesses to the truth of it.”

²²² Miranda v Arizona, 384 US436 [1966] Supreme Court

²²³ Police and Criminal Evidence Act 1984, s 77; Code C 11.14, 11.16.

²²⁴ Report of the Royal Commission on Criminal Procedure, 1981, HMSO.

²²⁵ PACE 1984 s 77, Code C, Annex E.

proceedings²²⁶. Evidence obtained where breaches of the Codes of Practice have occurred may be excluded under the court's exclusionary discretion under s 78(1) of PACE, which states that *"In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."*

The Court's common law discretion to exclude evidence is preserved in section 82(3) of PACE. Section 82(3) states: *"Nothing in this Part of the Act shall prejudice any power of a court to exclude evidence (whether by preventing questions from being put or otherwise) at its discretion."*

A Code of Practice issued under the duty placed on the Home Secretary under section 60(1) (b) PACE sets out the procedure for tape recording interviews with suspects. The use of tape recording led to more charges, more information about other offences and more confessions. If adverse inferences are to be drawn from a defendant's silence during interrogation, then the tape recording is again useful as a reliable account of what occurred. If the accused does confess in the absence of a solicitor, he may well argue that his solicitor would have advised silence if he had been present. If there is insufficient evidence to convict, the solicitor present should advise the suspect to stay silence but this rarely occurs.

Details of some specific cases in English law are examined to show where the right to pre-trial silence was an issue. An inference can be drawn where there is a case in existence against the accused already. The inference can add to the case but it cannot form a primary part of the case against the accused. In R v Howell²²⁷, Howell had been convicted of wounding with intent. His appeal centred the inferences drawn against him at trial for his failure to mention in the pre-trial period a fact which he later relied on in his defence. While the appellant had presented a defence of self-defence at trial, in the police station while questioned he had made no comment. He

²²⁶ Ibid, section 67(11).

²²⁷ [2005] 1 Cr. App.R. 1; [2003] EWCA Crim 1.

stated at the time that, having received legal advice, he was making no comment, as there was no written statement from the injured party.

In directing the jury in this case, the trial judge spoke in the following terms: “You must therefore decide whether in the circumstances these (self-defence related facts) were matters which he (the accused) could reasonably have been expected then to mention (during police interview). If that is your decision, the law is this that you may draw such common sense conclusions as appear to you proper from his failure to mention those matters at the time he was interviewed. Failure to mention those matters cannot on its own prove guilt, but depending on the circumstances, you may hold it against him when deciding whether he is guilty. You can consider it as some additional support for the prosecution's case. You are not bound to do so; it is for you to decide whether it is fair to do so.”

The jury in this case were asked to consider the reasonableness of the accused's reliance on the legal advice, which he received. The Court of Criminal Appeal looked at the judgment of the ECHR in Condron v UK. They held accordingly that an accused person might only have an inference drawn against him in circumstances where he might reasonably have been expected to mention the facts in question. The court opposed, however, a situation where the accused at trial might be able to systematically avoid the drawing of adverse inferences against him by stating that his silence was based on legal advice received. They were concerned also, that solicitors may come to advise silence for other than good objective reasons²²⁸.

The judge said

“I do not consider the absence of a written statement from the complainant to be good reason for silence (if adequate oral disclosure of the complaint has been given), and it does not become good reason merely because a solicitor has so advised. Nor is the possibility that the complainant may not pursue his complaint good reason or a belief by the solicitor that the suspect will be charged in any event whatever he says. The kind of circumstance which may most likely justify silence will be such matters as the suspect's condition (ill-

²²⁸ [2005] 1 Cr App R 1, 13 para. 24

health, in particular mental disability; confusion; intoxication; shock, and so forth – of course we are not laying down an authoritative list), or his inability genuinely to recollect events without reference to documents which are not to hand, or communication with other persons who may be able to assist his recollection. There must always be soundly based objective reasons for silence, sufficiently cogent and telling to weigh in the balance against the clear public interest in an account being given by the suspect to the police.”²²⁹

The Court then held that the judge’s direction to the jury in *Howell* did not render the convictions unsafe. They held that there was no soundly based objective reason for silence in this case and the jury were entitled to draw inferences from the appellant’s “no comment” interview.

The real question is one of reasonableness in all the circumstances. Even if the accused is told by his solicitor to remain silent, it seems that he must still assess for himself the reasonableness of that advice, whether there are soundly based objective reasons for his remaining silent, whether the advice of his solicitor is correct. The difficulties, which this creates for a suspect, are explored in detail below. In *R v Hoare and Pierce*²³⁰. Mr. Hoare was convicted of producing a class B drug and both he and Mr. Pierce were convicted of conspiring together to supply such a drug. They both appealed against their convictions. While detained at the police station in the pre-trial period, both men were advised by their solicitors to remain silent and not to answer any questions. Hoare’s solicitor implied during interview that he had so advised his client as it was unclear what evidence the police had to suggest that his client had committed an offence. Pierce’s solicitor stated during the police interview that he was of the opinion that his client had been held for too long, his detention was therefore unlawful and his was the reason for advising silence. At trial, Hoare asserted for the first time that he had not known what the product was and thought he was involved in the production of a chemical for use in cancer research. Pierce stated

²²⁹ [2005] 1 Cr App R 1, 13/14 para. 24

²³⁰ [2005] 1 WLR 1804; [2005] 1 Cr App R 22; [2004] EWCA Crim. 784.

that he had not known what was in a box delivered to him by Hoare but had thought that it was glassware, and not amphetamine as it turned out to be. Both appellants claimed at trial that they had remained silent during police interview based on the legal advice, which they had received. One of the grounds of appeal was based on the direction given by the trial judge to the jury which suggested that in order to avoid the drawing of an inference against the accused, the jury would have to find that he had reasonably, as opposed to genuinely, relied on the advice of his solicitor.

Auld LJ put it in the Court of Appeal,

“The issue raised by this ground is whether, when a defendant has remained silent in a police interview on the advice of his solicitor, the test for a jury when deciding whether to draw an adverse inference from his silence is subjective or objective, that is whether it is sufficient to preclude an adverse inference that he genuinely relied on it as a reason for silence or whether it is only so if, in the circumstances at the time, he could reasonably have relied on it as a reason for silence.²³¹”.

The Court of Appeal noted that in Condon v U.K the ECHR had stated that the fact that an accused had been advised by his lawyer to remain silent ought to be given appropriate weight because “there may be a good reason for such advice”^{232]}

The Court also noted the alleged conflict between the decisions in Howell and a similar decision in R v. Knight, The Times, August 20, 2003 and a similar decision in R v. Robinson²³³ However; the Court of Appeal concluded that there was in fact no conflict or inconsistency between these cases. The Court held that the critical test, as underscored in Betts and Hall, Howell and Knight is that formulated in s34 itself, i.e. whether a defendant failed to mention in interview a fact “which in the circumstances existing at the time ... he could reasonably have been expected to answer”. What is reasonable in the circumstances is a matter to be considered by the jury. It is an objective test, but it is tied to the subjective circumstances of the case before the jury.

231 [2005] 1 WLR 1804, 1815 para. 38

232 (2001) 31 EHRR 1 para. 60

233 [2003] EWCA 2219.

Auld LJ stated that “The question in the end, which is for the jury, is whether regardless of advice, genuinely given and genuinely accepted, an accused has remained silent not because of that advice but because he had no or no satisfactory explanation to give”,²³⁴.

In R v Beckles²³⁵ the case dealt with the s34 issue. It took the issue before the European Court of Human Rights (as had Condron before) and it seems to largely apply the ruling of Hoare and Pierce. The appellant had been convicted of robbery, false imprisonment and attempted murder. His appeal was based mainly on the ground of a s. 34 direction given by the judge to the jury at trial. While detained by the police, the appellant had been interviewed on two occasions. On the first occasion, he remained silent and refused to answer police questions based on legal advice, which he had received. During the second interview, however, the appellant had answered questions and had provided the police with an account of events similar to that to which he testified at later trial. He had also made certain general comments, which supported that account at the time of his arrest. The Court of Appeal initially dismissed his appeal against conviction and he applied thereafter to the European Court of Human Rights.²³⁶ The ECHR, in Beckles v UK²³⁷, held that the direction to the jury in the case had amounted to a violation of his right to a fair trial under Art. 6.1 as the judge had failed to direct them to consider whether the defendant's reason for remaining silent on legal advice was genuine. The case was then returned to the Court of Appeal, following the appellant's application to the Criminal Cases Review Commission.

Woolf C.J., giving the judgment of the Court of Appeal, largely agreed with the decision in Hoare and Pierce. He stated that

234 [2005] 1 WLR 1804, 1821 para. 55

235 [2005] 1 WLR 2829; [2005] 1 All ER 705; [2005] 1 Cr App R 23; [2004] EWCA Crim. 2766.

²³⁶ It is to be noted that the European Convention differs from other human rights treaties to which the UK is a party because the government has accepted the right of individual application (ECHR article 25). See P. Birks, ed., *Pressing problems in the law*, , Chpt. 8, “Self Incrimination and the European Convention on Human Rights” by C. Warbrick, Oxford University Press, (Oxford 1995)

237 (2002) 36 EHRR 162.

“In our judgment, in a case where a solicitor's advice is relied upon by the defendant, the ultimate question for the jury remains under section 34 whether the facts relied on at the trial were facts which the defendant could reasonably have been expected to mention at interview. If they were not, that is the end of the matter. If the jury consider that, the defendant genuinely relied on the advice that is not necessarily the end of the matter. It may still not have been reasonable for him to rely on the advice, or the advice may not have been the true explanation for his silence.”

Due to the misdirection to the jury the convictions were deemed unsafe, the appeal court could not be sure of the effect which the misdirection had had on the jury but it was possible that they had drawn adverse inferences against the appellant as a result of it and that had tipped the scales in favour of the prosecution case, or confirmed their belief in the prosecution case. The appellant's convictions were quashed and a retrial ordered.

UK Judicial Studies Board Specimen Direction

Because of the decisions in Hoare and Pierce and Beckles, the Judicial Studies Board issued a new specimen direction for s34 cases where it was claimed that the accused failed to mention a fact later relied on in his defence because of his reliance on legal advice obtained at the time of questioning. In this direction the word “reasonably” was added, where previously there had been reference only to the word “genuinely”.

“The defendant has given evidence that he did not answer questions on the advice of his solicitor/legal representative. If you accept the evidence that he was so advised, this is obviously an important consideration: but it does not automatically prevent you from drawing any conclusion from his silence. Bear in mind that a person given legal advice has the choice whether to accept or reject it; and that the defendant was warned that any failure to mention facts which he relied on at his trial might harm his defence....”²³⁸

²³⁸ JSB specimen direction

A jury must therefore consider not only the genuineness of the accused's reliance on legal advice but also the reasonableness of such reliance. The JSB specimen direction also lists, though it is not a conclusive list, the inferences which might be drawn and these include that the accused at the time of questioning had no answer to provide; that he had no answer which he thought would withstand scrutiny; that he has fabricated his account of events since the time of questioning; or that he has tailored his account to fit the prosecution case. It is also made clear that an inference may be drawn only where the prosecution case against the accused is strong already and that a conviction cannot be based mainly or wholly on any inference drawn.

In *Hoare and Pierce*, Auld LJ giving the judgment of the Court of Appeal made the following observation: "...an accused cannot reasonably be expected to assess the reasonableness or quality of his legal advice – to second-guess it"²³⁹.

In *Hoare and Pierce*, the solicitor of the latter appellant had stated during police interview that his reason for advising silence was that he believed that his client had been held beyond the legal period of detention and was therefore in unlawful detention at that time. In the event, it was held that the suspect had not been detained beyond the acceptable legal limits and his detention was at all times lawful. There was no suggestion that the solicitor had unreasonably considered that the detention was unlawful. In *Hoare and Pierce*, Auld LJ stated that "whether or not *Pierce* had a good legal basis for complaining about the length of his detention, it does not necessarily follow that it was reasonable for him, if innocent, to have exercised his right of silence rather than giving then the account that he was to give at trial"²⁴⁰. This seems to suggest that even if *Pierce* had in fact been held in unlawful custody it was not necessarily reasonable for him to remain silent, if he was innocent. Assessing the reasonableness of the suspect's reliance on legal advice in all the circumstances creates difficulties not only for the relevant suspect, but also for the jury. It is very difficult for a jury to decide after the fact whether a suspect remained

239 [2005] 1 WLR 1804, 1822

240 Ibid

silent on the advice of his solicitor or whether he is using that only as a “convenient shield behind which to hide”²⁴¹.

Full investigation powers are vested in the Serious Fraud Office, the Department of Trade and Industry, liquidators and the Serious Fraud Office²⁴². Such investigative powers lead to effectiveness in fraud investigation.²⁴³ The ECHR ruled in Fayed v UK²⁴⁴ that compulsory self-incriminating questions are legitimate for the purposes of regulatory fact-finding. Supporting this ruling is evidence in a 1994 Treasury Review of the operations of the SFO and the Fraud Investigation Group of the Crown Prosecution Service.²⁴⁵ Further support is found in the case W v Switzerland²⁴⁶ in which the European Court of Human Rights accepted that the intricacies of a serious fraud investigation might justify custodial questioning of an individual suspect for over four years. This is even more pertinent in these days of concern about the awards of those company directors, merchant bankers and brokers who might seek illegitimate rewards created and concealed by, for example, nominee shareholdings and overseas incorporations used for electronic transfer of funds, discretionary trusts, complex financial instruments and tax havens.²⁴⁷

UK Legal Privilege

The rationale of legal professional privilege is that a client should feel free to explain everything to his legal adviser without fear that such information will be used against him or will go beyond his confidential relationship with his lawyer. If a suspect needs to show now that he not only was genuine in his reliance on the legal advice which he received but that that advice was based on objectively reasonable grounds

²⁴¹ See JSB Specimen Direction on s.34.

²⁴² A.T.H.Smith, “The right to silence in cases of serious fraud” in *Pressing problems in the Law* (ed. P.Birks, 1995)

²⁴³ For example, in *Re Arrows Ltd (No.4)* [1994] 3 All ER 814, the ruling was that the Serious Fraud Office was to be permitted access to incriminating answers obtained by the Companies Court under powers invested under s236 Insolvency Act 1986.

²⁴⁴ (28.1993/423/502)

²⁴⁵ See Appendix 6 in *HMSO, Review of the Handling of Serious Fraud*, (London 1994)

²⁴⁶ A/254/1993

²⁴⁷ These vehicles were discussed in *Re London United Investments plc* [1992] 1 B.C.L.C.91 at pp113-114. See also *HMSO, Investigation into the affairs of the Peachy Property Corporation Limited*, HMSO (London, 1979), at para.227.

in all the circumstances, then there is a real danger that defendants at trial will be forced to waive their legal professional privilege in order to prove that. Once privilege is waived, the prosecution are free to ask questions on all of the communications between the suspect and his solicitor.

The effect of s. 34 on legal professional privilege was alluded to in R v Bowden²⁴⁸ in which case, the following statement was made:

“If, at trial, the defendant or his solicitor gives evidence not merely of the defendant’s refusal to answer pre-trial questions on legal advice but also of the grounds on which such advice was given, or if...the defence elicit evidence at trial of a statement made by a defendant or his solicitor pre-trial of the grounds on which legal advice had been given to answer no questions, the defendant voluntarily withdraws the veil of privilege which would otherwise protect confidential communications between his legal adviser and himself, and having done so he cannot resist questioning directed to the nature of that advice and the factual premises on which it had been based.”²⁴⁹

In Beckles, Lord Woolf C.J. noted the following:

“Where the reason put forward by a defendant for not answering questions is that he is acting on legal advice, the position is singularly delicate. On the one hand, the Courts have not unreasonably wanted to avoid defendants driving a coach and horses through section 34 and by so doing defeating the statutory objective. Such an explanation is very easy for a defendant to advance and difficult to investigate because of legal professional privilege. On the other hand, it is of the greatest importance that defendants should be able to be advised by their lawyer without their having to reveal the terms of that advice if they act in accordance with that advice.”²⁵⁰

²⁴⁸ [1999] 2 Cr App R 176, 184; [1999] 1 WLR 823; [1999] 4 All ER 43.

²⁴⁹ [1999] 2 Cr App R 176, 184

²⁵⁰ [2005] 1 WLR 2829, 2843 para. 43

The above analysis of cases in which the issue of the right to silence was raised, illustrate the predicament that this issue creates, notwithstanding the real problem in serious fraud cases, of getting to the essence of the transactions in question. The derogation in serious fraud cases is argued to be essential to understand the transactions in question and the case of Saunders v UK simply establishes, not that the silence should or should not be derogated but whether the statements made should be used in evidence in a subsequent criminal fraud trial. It must be remembered also, that, as in Miranda v Arizona, the right to a fair trial in which the right to silence lies, begins at the point that the criminal process begins, at arrest and not in processes before this point as occurs where SFO section 2 Criminal Justice Act interviews take place.

UK Right to Silence- Derogated by SFO, DTI and HMRC²⁵¹ Investigations

Full investigation powers are vested in the Department of Trade and Industry, liquidators and the Serious Fraud Office²⁵² and the Department of Environment. Such investigative powers lead to effectiveness in fraud investigation.²⁵³ The ECHR ruled in Fayed v UK²⁵⁴ that compulsory self-incriminating questions are legitimate for the purposes of regulatory fact-finding²⁵⁵. Supporting this ruling is evidence in a 1994 Treasury Review of the operations of the SFO and the Fraud Investigation Group of the Crown Prosecution Service.²⁵⁶ Further support is found in the case W v Switzerland²⁵⁷ in which the European Court of Human Rights accepted that the intricacies of a serious fraud investigation might justify custodial questioning of an

²⁵¹ See S.Ramage, "Criminal powers and the HMRC", (2006), Criminal Lawyer, Vol 176, p6, as quoted in *Fraud: Law, Practice and Procedure*, (LexisNexis, UK 2006)

²⁵² A.T.H.Smith, "The right to silence in cases of serious fraud" in *Pressing problems in the Law* (ed. P.Birks, 1995)

²⁵³ For example, in *Re Arrows Ltd (No.4)* [1994] 3 All ER 814, the ruling was that the Serious Fraud Office was to be permitted access to incriminating answers obtained by the Companies Court under powers invested under s236 Insolvency Act 1986.

²⁵⁴ (28.1993/423/502)

²⁵⁵ Also, in DC, HS and AD v UK (Application no. 39031/97 (14 September 1999, unreported), it was held that disqualifications proceedings were regulatory rather than criminal and so Article 6(2) and (3) did not apply. So, compulsorily obtained evidence can therefore be used in disqualification proceedings, as in Re Westminster Property Management Ltd, Official Receiver v Stern [2000] 1 WLR 2230

²⁵⁶ See Appendix 6 in HMSO, *Review of the Handling of Serious Fraud*, (London 1994)

²⁵⁷ A/254/1993

individual suspect for over four years. This is even more pertinent in these days of concern about the awards of those company directors, merchant bankers and brokers who might seek illegitimate rewards created and concealed by, for example, nominee shareholdings and overseas incorporations used for electronic transfer of funds, discretionary trusts, complex financial instruments and tax havens.²⁵⁸

Apart from the above analysis, cases such as R v Seelig and Spens are R v Saunders²⁵⁹ involved admissions made to a Department of Trade inspector conducting an investigation of a company's affairs pursuant to section 432 of the Companies Act 1985. These admissions were admissible as evidence in criminal proceedings against the person making the admissions even though they were self-incriminating and even though the inspector did not caution the confessors before requiring them to give evidence and produce documents because the inspector did not have to comply with section 67(3) of the Police and Criminal Evidence Act 1984. Seelig and Spens were convicted at trial and Spens and Seelig took the case to the European Court of Human Rights in 2002 where it was ruled that their confessions were in breach of their human rights to a fair trial.

In the case Funke v France,²⁶⁰ the European Court of Human Rights held that the applicant's right to a fair trial under Article 6(1) of the Human Right Convention had been infringed by a requirement to disclose documents concerning his tax affairs that would incriminate him. The French government argued that the customs authorities had not required Funke to confess to a crime or to provide evidence of one. The European Court's decision was that neither the obligation to produce bank statements nor the imposition of pecuniary penalties offended the principle of a fair trial. The judgement said that the criminal conviction was in order to obtain documents, which the customs officials believed must exist.

²⁵⁸ These vehicles were discussed in Re London United Investments plc [1992] 1 B.C.L.C.91 at pp113-114. See also HMSO, Investigation into the affairs of the Peachy Property Corporation Limited, HMSO (London, 1979), at para.227.

²⁵⁹ Saunders appealed to Europe. The European Court's decision in this case led to a distinction being made between the investigation process and the trial itself. See also R v Hertfordshire County Council, ex parte Green Environmental Industries Ltd ;2000] 2 AC 412,HL. See also HMSO, One Step Ahead: A 21st Century Strategy to defeat Organised Crime, HMSO, (London, 2004)

²⁶⁰ Funke v France [1993] 16 EHRR 297.

In Kansal v UK [2004]²⁶¹, the ECHR found that the use at a subsequent trial of answers given under compulsion of the Official Receiver breached the fair trial provisions of the European Convention on Human Rights even though the trial took place *before* that Convention was incorporated into English law by the Human Rights Act 1998, although the HRA 1998 is not retrospective.

France - Right to Silence

In France, the rights of the accused were traditionally very limited during the criminal investigation. The most important rights only arose at the point when the person suspected was formally officially ‘accused’. Nowadays, the suspect has rights from the time at which he arrives involuntarily at the police station. He may refuse to allow searches within the context of an *equate preliminaire*; he may also notify the procureur de la Republique and a person of his choice if he is subject to an identity check (article 78-3, para 1 CPP).

From the time an investigation is opened, an officer of the police judiciaire (article 62 CPP) may question any person who can provide information on an offence. If this person is being held on police premises, the police officer must state the length of questioning of the accused and the intervals between questioning sessions. This must be recorded on the written account of the interrogation and on a special register over which the public prosecutor has control (articles 64 and 65 CPP).

In the past, the French police had power to detain compulsorily not only suspects but also even certain witnesses by *garde a vue*. This power was abolished in 2000. Since 2000, only suspects may be placed in *garde a vue* and witnesses may only be detained for the time necessary to take their statements. (articles 62, 63, 153 and 154 CPP).

Germany Right to Silence

Roman law was of decisive influence on German criminal procedure. However, German law moved away from Roman law when in the 17th century it favoured a systematisation of the law, through a process of codification. The Code of Criminal

²⁶¹ Kansal v UK [2003] Application No. 21413/02

Procedure governs criminal procedure. Article 2 states “Criminal procedure is intended to educate towards respect for socialist law, socialist property, work discipline and democratic watchfulness”. Generally, the approach of the Code of Criminal Procedure follows continental European practice and incorporates most of the typical procedural guarantees. The code recognises the prohibition of double jeopardy, except that prosecutions may be instituted on felony charges after conviction for a misdemeanour in the same matter, and that trial may be instituted after imposition of a violations punishment; however, previously imposed and served punishments are deducted from subsequently imposed punishments.

Germany is a Federal Republic consisting of sixteen Lander – territorial units endowed with wide powers and their own decision –making bodies. There are various sources of law; at the top is the German Constitution, the Grundgesetz, and then there are federal laws and regulations and finally the constitutions, the laws and regulations of the Lander. The German Constitution, das Grundgesetz, established a State where the rule of law prevailed. It sets out fundamental guarantees and joins the traditional human rights in the field of criminal procedure. These are binding to the legislator, administration (public prosecutors) and judges in the form of directly applicable law (article 1 GG).

There is a Federal Constitutional Court, the Bundesverfassungsgericht, which is in Karlsruhe. The court rules on the conflicting opinions and doubts concerning the compatibility of systems of public law of the Federation and of the Lander and on constitutional appeals, Verfassungsbeschwerde made by anyone who believes a fundamental right of his has been violated by the public authorities. The Federation administers the federal courts and tribunals, while all other courts come under the jurisdiction of the Lander. Germany has 7117 local courts, Amtsgerichte, 116 district courts, Landgerichte, 24 high courts, Oberlandesgerichte, and one Federal Court of Justice, Bundesgerichtshof.

In criminal cases, there is the public prosecutor, the defence counsel, the police, the state officials, the victim, and the defendant. German criminal law does not accept the criminal liability of legal persons. So offences of serious fraud are brought against directors of companies under the criminal code and they can be tried for tort

offences under the civil code. Where the offence is serious and the trial takes place at the district court, Landgerichte, the presence of a lawyer is obligatory. A lawyer must be present also, if:

- the accused's previous counsel has been excluded from the procedure;
- if the accused has been remanded in custody for an extended period of time;
- if the court is considering whether the accused should be interned in a psychiatric clinic to assess his condition;
- if the accused has mental problems and runs the risk of being detained in a psychiatric institution;
- whenever the proceedings could result in the accused being prevented from exercising a particular profession (140 1, StPO);
- when the public prosecutor intends to request that, an offence is dealt with by the accelerated procedure in a case where the accused risks a prison sentence of over six months. (418 Invest PO).

In all cases, counsel must be appointed at the latest before the accused is asked to answer the indictment during the intermediate proceedings (141, St PO). German law is based on an adversarial system and the principle of the immediacy of evidence does not normally allow trials in the defendant's absence (Abwesenheitsverfahren) but only when the offence carries a minor sentence. A practising lawyer or a professor of law may be nominated as counsel for the defence at public expense. As far as evidence is, concerned, German procedure is guided by the principle of investigation or the principle of *factual* truth, which obliges a judge to seek out the truth in a case and to form an inner conviction without being bound by the statements recorded at the hearing. The result of this is that the accused gets the benefit of any doubt. Germany has anti-terror law of December 1986 (Gesetz zur Bekämpfung des Terrorismus) which make exception to the normal rules of criminal procedure.

In German criminal cases, the interrogation of the suspect must start by reading him his rights (Belehrungspflicht) or it will be void. These are the right to answer questions, or to refuse; to make or refuse to make a statement; and to request the assistance of a lawyer. The suspect must then be told of the charges against him. Finally the interrogation *stricto sensu* allows information concerning his personal

situation to be obtained, and then gives the suspect the chance to explain the accusations and to produce arguments and evidence as to why he ought to be discharged. Telephone tapping is allowed in serious cases but must be ordered by a judge by way of a warrant.

The German criminal procedure is not a procedure that puts the parties in opposition; the public prosecutor has the duty to investigate evidence favourably to the accused. Therefore, admissions by the accused do not exempt the judge from hearing witnesses to corroborate his confession. The participants in the proceedings can, at the first interrogation of the accused, request the interrogation of any evidence, which they consider useful to secure his acquittal. The request to obtain supplementary evidence later is subject to the discretion of the public prosecutor, who can allow or refuse the request. However, when the judge interrogates the accused, the judge must investigate the evidence, which the accused requests if it appears to be of use, if loss of this evidence is feared, or if it could lead to his release. (166 St PO)

Inadmissible evidence includes:

- certain subject matter (Beweiserhebungsverbote) such as the revelation by a State Official of a State secret without first obtaining permission;
- certain methods of obtaining evidence such as the statement of a witness who has NOT been informed of his right to silence (52 to 55 St PO);
- certain methods of investigating evidence, for example, - the use of physical ill-treatment, exhaustion,
- bodily interference, drugs, torture, deception or hypnosis. Constraints may only be used in so far as the law expressly permits it, and the suspect must not be threatened with acts that the law forbids or offered benefits to which he is not lawfully entitled;
- evidence adduced without permission of the competent authority, such as telephone tapping carried out by the police without judicial authorisation.

US - Right to Silence

The privilege against self-incrimination is included in the Fifth Amendment to the US Constitution. Also in the American Convention on Human Rights 1978, Article 8(2) (g) Right to a Fair Trial, states: “Every person accused of a criminal offence has the right to be presumed innocent so long as his guilt has not been proven according to law.”

The essence of the common law criminal procedure transported to the American Colonies was its use of a hierarchy graded to a hierarchy of offences, allowing lay judges to dispose of all but the most serious offences. Serious crimes were disposed of by itinerant or centrally located judges of high standing accompanied by professional lawyers responsible for the preparation of the State’s case. It may have been simply to prohibit methods of interrogation and not to afford criminal defendants a right to refuse to respond to incriminating questions.

The Right to Silence precedent cases in the USA are *Frazier v Cupp*¹, The United States Constitution provides minimal rights and guarantees and no law may be in conflict with it. The Constitution provides for two separate systems of law, that of the states and that of the national government. So two separate and distinct sets of courts. State and federal, exist side by side in the United States. The Constitution, 1789, outlines the duties and powers of various elements of government. It also guarantees basic rights to citizens.

The following Bill of Rights is applicable here:

- 5 No unreasonable search or seizure;
- 6 Due process; rule against double jeopardy; to not testify against self;
- 7 Right to a speedy trial in criminal cases, by jury, and to confront accusers and witnesses;

The Supreme Court of the United States is the highest court in the federal judicial system and the country. There are circuit courts of appeal and New York is the 2nd Circuit and Illinois the 7th Circuit. The basics of a criminal prosecution are that police officers, detectives and investigators investigate the alleged crime, interview witnesses and suspects and make an arrest based upon probable cause. Prosecutors are responsible for the ultimate decision to prosecute based upon the evidence. They are also responsible for deciding the charge and deciding what sentence the state will

seek. There are several types of police procedure, police procedures that are aimed at solving specific past crimes known to the police, (reactive procedures), police procedures that are aimed at anticipated ongoing and future criminal activity (proactive procedures) and prosecutorial and other non-police investigations conducted primarily through the use of subpoena authority.

They are aimed at uncovering criminal activity that is not specifically known to the police. The investigation is aimed at placing the police in a position where they can observe ongoing criminal activity that otherwise would be hidden from public view and not reported. It may be aimed at inducing persons who have committed crimes of a certain type, including many unknown to the police, to reveal themselves. Proactive investigations are often aimed at anticipating future criminality and placing police in a position to intercept when a crime is committed. Cases for grand jury investigation are cases such as serious fraud, crimes involving public corruption such as bribery, misuse of economic power such as price fixing and widespread distribution of illegal services or goods, such as organised crime operations. The grand jury investigations are used in a fraction of 1% of all criminal investigations.

The first step in a grand jury investigation is arrest. Once a police officer has obtained sufficient information to justify arresting a suspect, the arrest ordinarily becomes the next step in the criminal justice process. A constitutional right is involved in the right to remain silent. The Fifth Amendment provides protection against inferences from silence as to guilt. However, silence during interrogation does not necessarily come within the ambit of the Fifth Amendment. The US Supreme Court has brought it under the shield of due process as set out in the Fourth Amendment²⁶².

The Americans discuss the right to silence around the Fifth Amendment, which states, “*no person... shall be compelled in any criminal case to be a witness against himself*”.

²⁶² Doyle v Ohio 426 US 610 [1976]

A critical point in the history of the privilege with regard to pre-trial procedures was the case of Miranda v Arizona²⁶³. In *Miranda*, the police had failed to inform Ernesto Miranda of his right to see a lawyer. The Supreme Court, in *Miranda*, therefore laid down new guidelines for the police, to provide a procedural protection against improper police practices of federal and state law enforcers. So now, prior to questioning in custody, the suspect has to be warned by the police of his right to silence, his right to a lawyer at the police station as well as at trial. The police now have to tell the suspect that he can stop the interrogation at any point and have access to a lawyer on demand. Since the *Miranda* case, it is ruled that confessions are not admitted unless the prosecution could show that these procedural safeguards have been observed and that the defendant has waived these rights²⁶⁴ in full knowledge and voluntarily²⁶⁵.

These *Miranda* guidelines aim to prevent the mental and physical abuse of suspects at the police station and to prevent the accused from being tricked into making admissions. The *Miranda* case judgement is a reaffirmation of the importance of right to silence and it expresses the Supreme Court's recognition of the importance of judicial integrity and impartiality. It changed the face of police interrogation of suspects in the United States and the content of the *Miranda* rule may be described as follows- where a person in custody is to be interrogated²⁶⁶, he must first be warned of certain rights, which rights must be scrupulously honoured²⁶⁷, unless he waives them and, having waived them, does not later re-assert them. There are exceptions to the *Miranda* rule in cases where the accused testifies at trial and his confession is put to him for situations where public safety is endangered and for impeachment purposes²⁶⁸. It was principally concerned with the psychological pressures, which

²⁶³ Supra footnote 137

²⁶⁴ See North Carolina v Butler [1979] 441 US 369

²⁶⁵ See Colorado v Connelly [1986] 479 US 157

²⁶⁶ The leading case for the definition of 'interrogation' is Rhode Island v Innis [1980] 446 US 291

²⁶⁷ See Michigan v Mosley [1975] 423 US 96

²⁶⁸ Berkemer v McCarty [1984] 468 US 420 ; Terry v Ohio [1968] 392 US 1;

might easily be placed upon the suspect by use of strategies recommended in various police interrogation manuals.²⁶⁹

Right to Silence – A Critical Analysis

In the legal systems of France, Germany, and the USA, a defendant has the right to silence in that throughout the entirety of the criminal proceedings he or she has the right to refuse to answer questions, and may not be exposed to criminal sanctions for exercising this right. The only exception is in the United Kingdom in cases of serious fraud and bankruptcy, Road Traffic and suspected environmental offences. The European Court of Human Rights decided²⁷⁰ that the right to silence was implicit in the right to a fair trial. Only the United Kingdom has derogated this right in cases investigated and prosecuted by the Serious Fraud Office. The use in evidence of statements obtained from the defendant in breach of his right to silence is an important aspect of the problem of improperly obtained evidence.

The question most frequently discussed in this connection is whether a suspect's statement may be used in evidence where he made it without first being warned that he has a right not to talk. This question potentially raises once again the issue of evidence illegally obtained. In each country studied the solution depends on whether there was a legal duty to warn the suspect of his right to silence in the case in question, the terms of this duty if it exists, and the attitude of the court to breach of this obligation. France, the country where the inquisitorial tradition is strongest, is the least sympathetic to the defendant in this respect.

In the UK, the police are under a duty to caution a suspect before questioning him²⁷¹. In addition, if they fail to do so, this is likely to result in the court excluding his statement under section 78 of Police and Criminal Evidence Act 1984.

²⁶⁹ Inbau and Reid, *Criminal Interrogation and Confessions* (1st Edition, 1962) as discussed in P. Mirfield, *Silence, Confessions and Improperly Obtained Evidence*, (Clarendon Press, Oxford, 2003) at page 325.

²⁷⁰ *Supra* footnote 142

²⁷¹ Police and Criminal Evidence Act 1984, Code of Practice C.

The Code of Criminal Procedure in Germany also imposes a duty to caution²⁷². In Germany, where the duty to caution was introduced in 1964, the courts, after initial hesitation, eventually came down in favour of excluding statements made where the duty had been disregarded. German procedural law outlaws inferences from silence in general. However, it discriminates between total silence and partial silence. It is silence in the legal sense if the defendant merely protests his innocence or contests his involvement with the alleged offence or if he invokes statutory limitations or procedural obstacles. Furthermore, it cannot work to the disadvantage of the defendant if he chooses to remain silent when questioned by the police but makes a statement at the main hearing before the court. The opposite situation would certainly be the case of partial silence and could be considered by the trial judge. Whether extra-trial statements could be taken into account when the defendant chooses to remain silent before the authorities would be a separate issue. Statements made outside police questioning or court examination may therefore be taken into consideration.

Until recently, in France, there was no duty at all to caution the suspect and hence no question of excluding evidence of a statement they made without one, but that has changed in France since 1993. France has since 2000, comprehensive duty to warn. However, this new duty is not expressly stated in the current law books and so undermines the rights of the defence as to give rise to a nullité substantielle.

Two questions are posed with regard to the right to silence. Is it permissible to use a compulsorily made statement against a person? Are these replies capable of being used against him as evidence in a later prosecution? In English law, these are difficult questions. In principle, three results are possible:

- 1 The possibility of a prosecution displaces the obligation to reply; in other words, there is a privilege against self-incrimination;
- 2 The person is obliged to answer, but because his answer is made under compulsion, his reply may not be used as evidence in a criminal case;

²⁷² 136, 163a (3)-(4), 243(40, St PO.

- 3 The person is obliged to reply, and his replies, although he was obliged to make them, are capable of being used against him as evidence in a later prosecution²⁷³.

A situation in which the UK courts applied the third solution cost the United Kingdom a condemnation by the European Court of Human Rights in the Saunders case²⁷⁴. In response to this Parliament in 1999 passed a law²⁷⁵, which amended a series of earlier statutes that had made it compulsory for suspects to give information to official investigations, so that any information so given can no longer be used in evidence in a criminal case.

The second question concerns the accused that has chosen to exercise his right of silence. In US, law the answer has long been negative. In the United States the right to silence exists in the double sense – a person may not be punished for his refusal to talk, nor may he be judged guilty of the offence of which he is accused in consequence of his refusal to talk. There is one distinction between the American law of the right to silence and the UK law. The right to silence, even with inferences applies in the UK from interrogation of a suspect to trial, whereas the US treats the Miranda rights as distinct to the Fifth Amendment rights to silence as in the case Chavez v Martinez²⁷⁶ where it was held that a suspect, although not given his Miranda warning under persistent questioning did not have his Fifth Amendment right not to be “*compelled in any criminal case to be a witness against himself*” because the Court reasoned (per Thomas J.) that the phrase “criminal case” in the Fifth Amendment at least required that legal proceedings should have been started, and did not encompass the entire criminal investigatory process, including police interrogations.

English law took up the same position in the twentieth century and so did German law. However, in French law the position is different. If a defendant stays silent then the judge and jury can draw inferences from that. In England, this question has

²⁷³ R v Director of the Serious Fraud Office, ex parte Smith [1993] AC1

²⁷⁴ Saunders v UK [1997] 23 EHRR 313

²⁷⁵ The Youth Justice and Criminal Evidence Act 1999, Schedule 111

²⁷⁶ Supreme Court Chavez v Martinez US 123 [2003]. The claim was that the police violated Martinez’s Fifth Amendment right.

given rise to a great deal of controversy. In 1993 the UK Parliament introduced a Bill to permit the court to draw “*any conclusion which it considers proper*” from a suspicious refusal to reply to certain questions put by the police, the use at trial of some piece of evidence of which he earlier failed to inform the police, or a suspicious exercise by an accused of his right to silence at the trial. This law was enacted as sections 34 to 39 of the Criminal Justice and Public Order Act 1994. Overall, in the UK, a crucial protection for the accused, the right to silence, has been lost.

For France, UK and Germany who have ratified the European Convention on Human Rights, the ECHR point of view must also be considered. Inferences from silence may only be added as a corroboration of the prosecution’s case. Furthermore, the European Convention on Human Rights contains no express guarantee of a privilege against self-incrimination. While such a right has to be implied, there is no treaty provision, which expressly governs the effect, and extent of what is to be implied. The jurisprudence of the European Court of Human Rights very clearly establishes that while the overall fairness of a criminal trial could not be compromised, the constituent rights comprised within Article 6 of the ECHR are not themselves absolute.

The immunities of the ECHR are as follows:

- a general immunity, possessed by all, from being compelled on pain of punishment to answer questions posed by others;
- a general immunity, possessed by all, from being compelled to provide answers to questions, which may incriminate them.
- a specific immunity, possessed by all criminal suspects being interviewed by police and others in authority, from being compelled to answer any questions;
- a specific immunity, possessed by accused persons at trial, from being compelled to give evidence or answer questions, and
- a specific immunity, possessed by all accused persons at trial, from having adverse comment made on any failure to answer questions before trial or to give evidence at trial.

The United Kingdom has derogated the first two of these immunities with the Criminal Justice Act 1987²⁷⁷, the Insolvency Act 1985²⁷⁸ and the and the United Kingdom has indirectly derogated the three specific immunities. As to UK trials, although a person has the right not to say anything at his trial from start to finish, in theory, the jury are usually exhorted to apply their common sense to a case. Furthermore, although the silence of an accused at trial cannot be commented upon by the prosecution, this silence can be commented upon by a co-accused. In addition, the co-accused can incriminate the accused even though the accused may have chosen to exercise his right to silence and this mixed statement is allowed in the UK to be put in evidence in its entirety, thus prejudicing the defendant. Article 6 is an unqualified right to a fair trial. English law has eroded this right²⁷⁹ and English law has evolved to give increasing powers to various public authorities²⁸⁰ to compel a suspect to answer questions and to prosecute those who fail to respond.²⁸¹

²⁷⁷ R v Director of SFO, ex parte Smith,

²⁷⁸ Re Pantmaenog Timber Co Ltd. [2003] H

²⁷⁹ Although in the context of a fraud case not prosecuted by the SFO, legal privilege applies. Also “Without Prejudice” privilege still applies if the document relates to a dispute settlement. At present, it is still not clear whether in-house lawyers and client advice communication is subject to legal privilege and there is an ECHR pending case on the matter, the Akzo Nobel in-house privilege case, which decision is expected in 2008.

²⁸⁰ See Criminal Justice and Public Order Act 1994; see also Serious Organised Crime and Police Act 2005 and Criminal Justice Act 1987 and Proceeds of Crime Act 2002. A Serious Crime Bill follows the Serious Organised Crime Act 2005. Its key provisions would set up a new civil order, the Serious Crime Prevention Order, which could be imposed on individuals or bodies corporate. Application will be to the High Court, or the Crown Court upon conviction, and breach of the order will be a criminal offence. The powers will be very wide ranging, enabling restrictions or requirements of any kind to be imposed, for example, on individuals' business or property dealings, and on the ability of companies to enter into agreements or to provide goods or services. The Serious Crime Bill includes a number of provisions relating to the sharing of personal data by public bodies for the purpose of preventing fraud. It enables public authorities to join certain specified anti-fraud organisations and disclose information to them and any of the members of such organisations for the purpose of preventing fraud, it also proposes giving the Audit Commission the power to conduct data-matching exercises involving the comparison of sets of data to determine how far they match. Data matching, which includes the identification of patterns and trends, is exercisable for the purpose of assisting in the prevention and detection of fraud. The Bill would also abolish the common law offence of incitement and create new offences of intentionally encouraging and assisting crime and encouraging or assisting crime believing that an offence will be committed. See the Law Commission's Report "Inchoate Liability for Assisting and Encouraging Crime" (Law Com No. 300 Cm 6878, 2006).

²⁸¹ R v Allen [2001] 3 WLR 843, HL.

The European Court of Human Rights has tried not to interfere with the application of domestic laws of evidence²⁸². The European Court has concerned itself more with procedural fairness, including the manner in which the evidence was taken to decide whether the proceedings as a whole were fair.

The right to silence is *not guaranteed* in any part of the International Convention on Civil and Political Rights, although Article 14.3(g) of the ICCPR states that:

“In the determination of any criminal charge against him, everyone shall be entitled...

(g) not to be compelled to testify against himself or to confess guilt...”

In the United States of America, The right to silence is upheld in the Fifth Amendment of the Constitution.²⁸³ The American prosecutors abide by this Amendment by obtaining confessions instead. There is a new US Department in Justice, created in 2002, since when there have been 290 separate white collar criminal cases brought of which 250 confessed and pleaded guilty²⁸⁴. Before 2002, the average white collar crime case number was 50. America also has the Clayton Act which allows the right to bring private anti-trust actions which must be brought against individual officers of a corporation as the courts in the US do not recognise a legal personality for this purpose.

In America, there is the problem of false testimony, which in effect is a way of establishing the defendant’s right against self-incrimination. The way that they have addressed the problem is by putting the onus on the defence lawyer through a Rule 3.3 of the Restatement of the Law Governing Lawyers²⁸⁵ 1983. This can be argued to

²⁸² Schenk v Switzerland [1991] 13 EHRR 242 and Khan v UK [2000] 31 EHRR 45.

²⁸³ USA precedent ‘right to silence’ cases are Frazier v Cupp, 394 US731, 89 S.Ct 1420 [1969]; State v Cayward 552, So.2d 921 (Fla.1989); State v Patton 826 A 2d 986(N.J.2003); State v Chirokovskic, 860 A 2d 986 (N.J. Super 2004) and Commonwealth v Novo, 442 Mass.262, 812 N.E.2d 1169 (Mass.2004)

²⁸⁴ The Economist, Feb 28th 2004.

²⁸⁵ In 2006, the Federal Court’s decision in Lily Icos et al. v Pfizer Ireland Pharmaceuticals (2006 FC 1465) was that even a Patent agent cannot be recognised for legal privilege. The Court ruled that the UK’s statutory privilege was an evidentiary rule with a strict territorial limitation that did not create an absolute privilege or purport to prohibit disclosure in other jurisdictions.

be violating the defendant's sixth Amendment right to effective assistance of his lawyer and thereby his right to a fair trial.

There is a revised Rule 3.3 since 2002. This revised rule states that:

(a) "A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes to be false.
- (4) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including if necessary, disclosure to the tribunal.
- (5) The duties continue to the conclusion of the proceeding.
- (6) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse."

The US defendant, on the other hand, has the constitutional right to testify on his own behalf. For the lawyer to disclose confidential information to the court is to break the privilege of the client-counsel relationship and to establish a sixth amendment violation of the defendant's right. This privilege against self-

incrimination is derogated in respect of documentary evidence²⁸⁶. In respect of documents, though, privilege issues are increasing at an exponential rate in the US. A sample of the type of privilege issues is as follows:

In Williams v Sprint/United Management Co, 2006 U.S. Dist. Lexis 47853 , inadvertently produced spreadsheets categorising employees to be retained and employees to be terminated were ordered to be returned to the defendant because the spreadsheets had been prepared at the direction of the defendant's lawyers and were protected by legal privilege²⁸⁷.

In the UK, there has been no dispute on privilege as to which lawyer's communication is privileged with the client when many lawyers were communicating with him, whilst in the US, waiver of attorney-client privilege frequently arises as an issue (as in legal malpractice cases) when it is discovered that privileged communications between client and counsel show that attorneys other than the malpractice defendant played a substantial role in bringing about the client's loss.

In re Quest Communications International Inc Securities Litigation²⁸⁸, privileged documents released by a company to the SEC and the Department of Justice had lost their privileged status and had been disclosed to plaintiffs in a private action against the company.

In Crossroads Systems (Texas) Inc. v DOT Hill Systems Corp.,²⁸⁹ the failure of the defendant's lawyers to object to the use of an inadvertently- produced privileged document at a deposition waived the legal privilege as to that document and all communications related to it.

In Banks v Office of the State Sargeant-at-Arms,²⁹⁰ documents attached to letters, facsimiles, and email from the client to lawyer were not privileged unless they were

²⁸⁶ In Fisher et al v United States, 425 US 391 [1976], No 74-18, the taxpayer was under investigation for possible civil or criminal liability under Federal income tax laws, after having obtained from their accountant, certain documents relating to the accountants' preparation of the tax returns, transferring the documents to their attorney to assist the taxpayer in his defence. The IRS serves summonses on the attorney to produce the documents and the attorney refused to comply. The Government brought enforcement action but the Court of Appeal reversed, holding that by virtue of the Fifth Amendment the documents would have been privileged from production, in light of the client-attorney privilege. The US Supreme Court held that compelled production of the documents in question from the attorneys does not implicate whatever Fifth Amendment privilege the taxpayer-client might have enjoyed. Enforcement against a taxpayer's lawyer would not "compel" the taxpayer to do anything and would not "compel" him to be a witness against himself.

²⁸⁷ Professionals often claim confidential communications with their clients are the cornerstone of the profession's social function. Lawyers claim confidentiality increases clients' consultation with lawyers and promotes candour. A more recent claim is that confidentiality promotes client compliance with the law. Jurisdictions have recognized the importance of confidentiality by granting lawyers with a testimonial privilege .

²⁸⁸ 2006, U.S. App. Lexis 14937 (10th Circuit)

²⁸⁹ 2006 U.S. Dist. .Lexis 36181,

²⁹⁰ 2006, U.S. Dist. Lexis 33912

privileged when in the hands of the client. Transmission of the documents to the defendant's lawyer did not make the documents privileged.

In Kaufman v SunGard Investment Systems,²⁹¹ legal privilege was waived as to email between an employer and her lawyer that had been deleted from her laptop but then recovered by her employer when the laptop was returned. The email had been sent from and received on the employer's email system, and the employer had a company policy regarding use of company property that provided a right of access to and inspection of all electronic systems.

In Urban Box Office Network Inc. v Interfase Management,²⁹² email from a lawyer making the same sort of suggestions as a financial advisor during negotiation of a share purchase agreement was not privileged because it did not involve legal advice.

In Synthes Spine Co. L.P. v Walden,²⁹³ it was decided that regardless of any privilege, a party must disclose all materials, including email, that a testifying expert for the party "generated, reviewed, reflected upon, read, and/or used in formulating his conclusions" even if the materials were rejected by the expert in reaching his opinions.

In re Natural Gas Commodities Litigation, "Natural Gas 11",²⁹⁴ in an action by natural gas futures traders against the energy companies, the court denied a motion to compel production of privileged documents disclosed by the energy companies to the government. Voluntary production of the documents pursuant to an explicit waiver agreement did not waive privilege.

The new US Restatement of the Law Governing Lawyers 2003 makes an exception to the client-attorney privilege as regards fraud²⁹⁵²⁹⁶. Here the USA has made an exception to the legal privilege.

²⁹¹ 2006, U.S. Dist. Lexis 28149

²⁹² 2006, U.S. Dist. Lexis 20648

²⁹³ 2005, U.S. Dist. Lexis 34974

²⁹⁴ 2006, U.S. Dist. Lexis 31278

²⁹⁵ L.M. Steckman, "The Assertion of Attorney Client Privilege by Counsel in Legal Malpractice Cases - Policy, Privilege and the Search for Truth in Cases Involving Implied Waivers", (2005), Lester Schwab Katz & Dwyer, LLP.

In the United Kingdom, legal privilege can only be waived by the client and not by the solicitor in theory, although case-law decisions show a similar slant to the USA's position, not by statute but by the facts of the case. The case of Walsh Automation (Europe) Ltd v Bridgeman and others²⁹⁷ is one in which legal advice obtained in furtherance of crime or fraud lost its privilege.

this "fraud exception" has been so termed by Lord Denning in a previous case when he suggested that the test should be that if there was an obvious fraud then the relevant party should not be allowed to shelter behind the cloak of privilege. In the Butte case that Lord Denning decided, his decision was that the facts of that case did not warrant the privilege to be waived even though Justice Eady in the lower court, gave an order for disclosure of all the categories of documents identified including any relating to legal advice.

As America has moved away from legal privilege, the United Kingdom appears to be reinforcing legal privilege at least as far as citizens income tax affairs are concerned. In 2002, the United Kingdom Inland Revenue was unsuccessful in forcing companies and individuals to disclose confidential legal advice that they had received from their legal advisors (House of Lords)²⁹⁸. The privilege is held by the client and only the client can waive the privilege. The UK should follow the new US Sarbanes-Oxley Act, which enables the SEC to be entitled to request and receive copies of both US and non-US auditor's working papers, regardless of any confidentiality requests from companies in this regard. This rule also applies to US internal and external company lawyers and to non-US lawyers if they advise a company on US law without

²⁹⁶ Whilst at the same time, the UK has reinforced client-solicitor privilege as an exception to the Money Laundering obligations to whistle-blow.

²⁹⁷ Walsh Automation (Europe) Ltd v Bridgeman and others [2002] EWHC 1344 (QB)

²⁹⁸ But in cases where legal professional privilege hides dishonest assistance, a case can be brought as in Cattley v Pollard[2006] in which the first defendant, Nigel Pollard, was a solicitor who dealt with the administration of an estate. The second defendant was his wife. Between 1987 and 1996, Mr Pollard misappropriated about £317,000 of estate assets. The trustees brought proceedings against the defendants for this sum and entered judgment against Mr Pollard. They subsequently brought proceedings against Mrs Pollard for damages or equitable compensation arising from her knowingly and dishonestly assisting her husband in the breaches of trust.

consulting a US lawyer. If lawyers discover irregularities, they must report them. These rules also require companies to provide in their financial reporting, detailed disclosure of off-balance sheet transactions, including a description of the relationship between such transactions and a company's non-consolidated subsidiaries²⁹⁹.

As to documents that are privileged, all correspondence between client and solicitor are privileged in the United Kingdom, as are all documents that have been obtained without a search warrant except those required under the Criminal Justice Act 1987, the Insolvency Act 1985, the Environmental Protection Act 1990 and the Anti-Terrorism Act 2003. In New York, documents obtained without a search warrant are admissible whilst they are excludable in Illinois³⁰⁰.

Conclusion to Chapter 4

The right to silence is not the same as the right to be presumed innocent but both fall within the concept of the right to a fair trial. The principle underlying the right to remain silent is of historical origin. In the UK, both the principles of the presumption of innocence and the right to silence are rooted in common law and statute; the 1984 Police and Criminal Evidence Act provides that everyone who is arrested has the right to remain silent and to be informed of that right and of the consequences of not remaining silent. The 1998 Human Rights Act provides that every accused person has the right to a fair trial, which includes the right to be presumed innocent, to remain silent, not to testify during the proceedings and not to be compelled to give self-incriminating evidence. Evidence obtained in a manner that violates these rights must be excluded if the admission thereof would render the trial unfair or otherwise be detrimental to the administration of justice.

The UK has exceptions to these in the form of the 1986 Insolvency Act and the 1987 Criminal Justice Act, the 2002 Enterprise Act and the 2003 Anti-Terrorism Act

²⁹⁹ Clifford Chance, German Govt introduces Financial Market Promotion Plan, Newsletter March/April 2003. This article continues with news that the German Investment Act 2003 means that Hedge Funds are now a regulated market in Germany.

³⁰⁰ R.A. Atkins. and P.H. Rubin., "Effects of criminal procedure on crime rates", Emory University, Atlanta, 1998.

which compels persons to provide incriminating documentary evidence and compels them to give interviews to the authorities on pain of punishment or imprisonment in contravention of the European Convention on Human Rights which the UK has ratified.

In the UK, the right to silence has many facets. It consists of immunities, which differ, in origin, incidence and importance with certain exceptions. They are –

- A general immunity possessed by all, from being compelled on pain of punishment to answer questions posed by other persons or bodies, except if posed by the Department of Trade, the Office of Fair Trading and the Serious Fraud Office.
- A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind, except when the police are investigating terrorism, when they can hold a person in breach of the Police and Criminal Evidence Act, without a solicitor being present and for longer than the rules of PACE stipulate.
- A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in court.
- A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by the police officers or persons in a similar position of authority.
- A specific immunity, possessed by accused persons undergoing trial, from having adverse comment made on failure to give evidence at trial.

In the UK, the examination of all witnesses, including the accused, if he offers himself as a witness, is conducted principally by the advocates for the parties. In this adversarial model of criminal procedure, the judge does not himself examine witnesses, except that he can put supplementary questions.

In France, there is the presumption of innocence, a right to counsel and the right to silence. At an early stage of the proceedings, the accused has an absolute right to inspect all the evidence collected by the police, the prosecution and the investigating magistrate. A distinguishing feature of the trial itself is that the *viva voce* witness is the accused. Although there is the right to silence, it is rarely exercised. The trial is a one-stop trial. After the closing arguments, one judgement on both conviction and sentence is delivered. Mitigating factors have therefore to be placed before the court *ab initio*. The trial focuses on the accused and emphasises his side of the case. There is no jury in these cases. The French have a Penal Code and rules of procedure. Most of the arguments are in writing and judges usually conduct the examination of witnesses through counsel. The burden of proof is on the judge. There are no rules of evidence. In addition, the judges may admit all evidence they deem fit and are free to question the accused. If expert witnesses are used, they are chosen from a government list. Such experts write long written reports rather than give oral testimony. Therefore, in France, the trial is a public review of the dossier and of the findings of the examining magistrate.

In Germany, a criminal prosecution begins with an official investigation of the alleged crime by the police. When the preliminary investigation is complete, the prosecutor then takes control of the case and it is he who decides whether there is enough evidence to prove that the suspect committed the crime. The examination of witnesses is non-adversarial and free from most non-exclusionary rules of evidence and conducted by the judge. The defence has access to the dossier. The German criminal trial is mostly a concentrated trial, which is started and concluded in one sitting. The first person to be examined is the accused who is informed that he may remain silent. The UK can benefit from learning about French, German and US fraud by an exemption to the legal privilege of solicitor/client communications in all fraud cases. The analysis can also be summarised as follows:

The privilege against self-incrimination-Comparison between France, Germany, UK, USA

ISSUE	FRANCE	GERMANY	UK	US
Implied right Overriding rights	Ius Commune	Ius Commune	Magna Carta 1215 (repealed)	Federal Bill of Rights 1788
Convention	ECHR	ECHR	ECHR	International Convention of Civil and Political rights Article 13(3)(g)
Legislation	Code d'Instruction Criminelle 1808	Criminal Code 1871	PACE 1984	3rd & 5th Amendment
Protective Code	Code de Procédure Pénale 1958	Criminal Code 1975	PACE 1984	Miranda Rights
Derogations	Full	None	CJA 1987 s2	None
Legal reasons for silence	None	Universal	Mental incapacity, and distress	Universal
legal aid	Limited	Yes	Yes	Yes

What can the UK learn from the issue of the right to silence and the way it is treated in France, Germany and the US?

In respect of serious fraud trials, the UK has derogated the right to silence to obtain information, yet the UK's record for fraud is of concern. This indicated the need for other remedies.³⁰¹

Serious corporate fraud, committed by intelligent professionals is hidden behind other privileges. Serious fraud evidence is mostly documentary evidence and it is the

³⁰¹ See article by P.Madigan, "In the line of Fire", in OPRISKS, May 2007 Issue. In the global fight against money laundering, financial institutions are developing various hi-tech weapons. Also in the same journal is the report, "Accurate ID system is key to bank security". Authorisation crucial to stopping fraudulent staff, says report. See also article by E.Davis, "Basel 2". Him Chuan Lim, Basel II programme director at DBS Bank in Singapore discusses operational risk's complex relationship with both credit risk and market risk.

legal privilege of solicitor/client correspondence that the UK should be considering for exemption³⁰² in fraud cases. Her Majesty's Revenue and Customs (HMRC) have powers to seize accountants' working papers in respect of a suspected company or person.

Serious complex fraud trials should be conducted without a jury as in France and Germany and documentary evidence by written reports of experts, chosen from a government list is one other method that can be copied from the German and French courts.

³⁰² The legal privilege is partly exempt for the Money Laundering Regulations and is exempt for SFO investigation under Criminal Justice Act 1987.

CHAPTER 5 - DOUBLE JEOPARDY AND HEARSAY EVIDENCE

Double Jeopardy Overview

Double jeopardy is also known as *none bis in idem*. *Non-bis in idem*, or the double jeopardy rule, are an international criminal law principle according to which a person cannot be prosecuted more than once for the same act. Yet in England, the double jeopardy will soon apply in fraud cases among others³⁰³. If double jeopardy came into force simultaneously with the proposed removal of the jury in cases of serious fraud, then the whole issue of the right to a fair trial could be seen as a total derogation of the citizen's human right of article 6 ECHR, especially as the UK's Serious Fraud Office uses the charge of conspiracy to defraud in the majority of its cases.

UK Double Jeopardy

There are two rules of English law, which protect a defendant against double jeopardy³⁰⁴. There is one exception to the rule and this exception is enacted in the Criminal Procedure and Investigations Act 1996. A defendant's acquittal can be quashed by the High Court and he can be retried if someone has subsequently been convicted of an "administration of justice" offence³⁰⁵. The second rule of English law, which protects a defendant against double jeopardy, is the Connolly Principle.

³⁰³ It is to be implemented by amendment to the Criminal Justice Act 2003.

³⁰⁴ Cartelists can have fines imposed by several international regulators. The European Court held that the principle of "double jeopardy" does not require the European Commission to take into account fines imposed by non-EU member states, in this case the US authorities, when setting its fines. SGL Carbon is the world's largest producer of carbon and graphite products. In 2002, SGL was fined € 27.75 million by the EU Commission for cartel offences against the Competition laws. SGL then filed a second appeal with the European Court. The European Commission had been investigating the graphite industry since 1997, and it decided to impose fines in the area of graphite electrodes in July 2001. SGL Carbon appealed against this previous fine to the European Court, in particular on the grounds of unlawful double jeopardy (SGL has already been investigated by the Canadian and also the U.S. antitrust authorities and there had been civil actions related to these investigations as detailed in the Company's filings with the U.S. Securities and Exchange Commission.) as well as grossly disproportional. In view of the penalties already imposed and the fact that it concerns the same events during the same period of time and in the same environment, SGL Carbon thought that the European Commission was not entitled to impose a further fine upon the Company. But the Court disagreed. See <http://www.sglcarbon.com/ir/press/press/news/021217.htm>

³⁰⁵ Such an offence would be the perverting the course of justice, an offence under the Criminal Justice and Public Order Act 1994, section 51(1). Such an offence can also be an offence of

The Connolly principle derives from the case R v Connolly³⁰⁶. The Connolly rule is that where the facts are substantially the same, a defendant should **not** be tried a second time for any offence arising out of those facts, regardless of whether or not it is the same as the offence in the first trial, unless there are ‘special circumstances’. For example, a person should not be tried for robbery after having been acquitted of murder. The rule can be seen as a particular form of a more general principle, that a court will stop a prosecution if it is impossible for a defendant to have a fair trial, or if it is unfair to put him or her on trial, because to do so would be an “abuse of process”. However, the Connolly principle is a flexible rule, in that it does not apply if the judge correctly concludes that there are “special circumstances”. There is little case-law on what might constitute “special circumstances” for the purpose of the rule, but the emergence of new evidence can be a “special circumstance”.

The Law Commission Report was requested after the case of R v Moore [1999]. The facts of the Moore case were that in 1992 Moore was tried with a fellow member of a gang for murdering a member of a rival gang. A defence witness gave alibi in favour of Moore that led to his acquittal. Later in the year, Moore was charged with conspiracy to pervert the course of justice through persuading the witness to lie under oath. In addition, Moore was found guilty and sentenced to 7 years imprisonment. He cannot be retried for the murder case because of the double jeopardy rule.

The Law Commission recommended that the exception to the double jeopardy rule should apply in cases where the accused has secured an unmerited acquittal on a serious charge such as perjury, or by other such conduct. It recommends that the exception should be confined only to serious cases such as murder, treason, sabotage, sexual violation, wounding with intent and Class A drug cases and recommends the new charge of “administration of justice crime”.

However, it can be argued that the exception to double jeopardy rule is an important cornerstone of the law and that the Law Commission’s report was an over-reaction

aiding, abetting, counselling, procuring, suborning or inciting another person to commit an offence under the Perjury Act 1911, section 1.

³⁰⁶ R v Connolly [1964] AC 1254.

based on one particular case, R v Moore [1999]. The Law Commission moreover recommended that the change should be retrospective. This new exception, now implemented, does not breach Article 7 ECHR, which is an embodiment of legal certainty. Article 7 is a guarantee against the retrospective application of the criminal law but it is broadly interpreted. In “the case SW v United Kingdom³⁰⁷. The European Court of Human Rights emphasised that the principle in Article 7, although the extension of a statutory or common-law offence, is prohibited from being extended to become a crime. This does not prohibit the development of the criminal law through judicial decisions.

The Serious Fraud Office trial of R v Andrew Regan in 2003³⁰⁸, proceeded by a civil trial for the same conduct, can be argued to be a double jeopardy case. On 6th August 2003, Andrew Regan was acquitted of serious fraud charges brought by the UK’s Serious Fraud Office. He was found not guilty of stealing £2.4 million from his company Hobson plc. It is also in contrast with other countries, which would treat the participation of civil parties in criminal proceedings as *res judicata*³⁰⁹. An example of this is the case of Hoystead and others v Commissioner of Taxation³¹⁰. In this case the Respondent commissioner was estopped from supporting his assessment of the appellants for the tax year 1920/21 because the same principle of tax law had already been decided in the Appellants’ favour by the High Court in respect of the tax year 1918/19 but was identical save for the differing tax year.

The case of Andrew Regan is similar to many cases where the Official Receiver, in interviewing a person in bankruptcy, can pass the information to the police in order for that person to simultaneously be prosecuted for any criminal acts divulged during a compulsory interview. This is unlike the situation in the USA, as in the case of Revenue of Montana v Kurth Ranch³¹¹. In this case, the state of Montana has tax

³⁰⁷ SW v United Kingdom [1996] 21 EHRR 363

³⁰⁸ R v Regan [2003] unreported.

³⁰⁹ That is, as estoppel in that the issues sought to be raised in the instant proceedings are identical to that decided in the previous proceedings.

³¹⁰ Hoystead and others v Commissioner of Taxation, CA [1939] 2 KB 426.

³¹¹ J.Hildy.,” Case review – Revenue v Kurth Ranch”, Journal of Criminal Law and Criminology, March 1995

laws for dangerous drugs. Montana prosecuted Kurth Ranch for a criminal offence in respect of dangerous drugs first and afterwards for a tax offence. This was deemed to have violated the Double Jeopardy Clause. The decision of the court was that it was possible that the tax avoidance and the amount of the tax avoidance could have been included as part of the criminal charges in one case. This would have forced the Revenue to assess the amount of tax owed at the start of the criminal proceedings. Tying down this figure for the first proceedings would have greatly reduced the amount of alleged penalties and interest found to be owed to the Montana Revenue in the second proceedings. In addition, criminal prosecution would be barred if the tax had been imposed first. The excessive fines, interest, and capital owed to the Montana government was because of multiple prosecutions.

UK Hearsay Evidence

In Subramaniam v Public Prosecutor³¹², His Lordship said

“Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.” Not all out-of-court statements are hearsay. It will be hearsay where it is an out-of-court assertion, whether orally, in writing or by any other means and it is admitted to prove the truth of the facts stated therein. An out-of-court statement will not be hearsay where it is produced in court simply to assert that it was made, not that it was true. Other examples where the statement will not be regarded as hearsay include statements admissible in confirming other evidence, statements as evidence of identity or origin, or a statement which is admitted to prove that was made in a particular way. It is not hearsay to admit a prior statement to prove its falsity rather than the truth.³¹³

Therefore, in summary, a hearsay statement is one made out-of-court, in words or gestures, making an assertion, which the court is asked to believe, is true. There are

³¹² Subramaniam v Public Prosecutor [1956] 1 WLR 965

³¹³ Khan v R [1967] 1 AC 454

common law exceptions to the hearsay rule. These exceptions are those statements related to a specific event, including the alleged crime, related to the maker's mental, emotional or physical state, statements related to the maker's performance of an act, certain statements by a person since deceased and statements in furtherance of a common purpose. The rule against hearsay developed through fear of the unreliability of evidence, which cannot be rebutted in a court of law. If a person says that someone else says something, that someone else's statement is hearsay because that other person is not in court to be cross-examined as to the veracity of their statement and this violates the right of the defendant to a fair trial.

In R v Sharpe³¹⁴ in the House of Lords, Lord Havers said that hearsay is "an assertion other than one made by a person while giving oral evidence in the proceedings...as evidence of any fact asserted". In fraud cases, the standard of proof must be high, these being criminal cases. Even so, some hearsay evidence, or second-hand indirect evidence is now allowed in criminal cases in the UK.

The issue of hearsay evidence is referred to as the Peter v Peter and Hand v Neuberger Properties Ltd principle. The quality of evidence in criminal trials in England and Wales must comply with a number of rules such as the rules regarding similar facts, character, and corroboration, restrictions on cross-examination of the accused, hearsay, confessions and opinion evidence. These rules provide regulation over the admission of certain kinds of evidence; they control the admission of certain kinds of evidence, which may not have been properly obtained against the accused, and they guard against the admission of certain kinds of evidence such as hearsay evidence. Hearsay evidence makes it difficult for the defence to challenge effectively. That there has been a relaxation of the constraints of hearsay evidence is a worry, because the rule against hearsay evidence ensures that the defence are given the chance to cross-examine those witnesses.

³¹⁴ R v Sharpe [1988] 1 WLR 7

Expert evidence is an exception to the hearsay rule³¹⁵. Expert evidence in the UK differs from evidence by a lay witness who can only give evidence of fact, whereas expert witnesses can give evidence *of expert opinion upon facts* put before the court; expert witnesses can explain technical subjects or the meaning of technical words; they can explain evidence of fact, the observation, comprehension and description of which require expertise, thereby giving hearsay evidence of a specialist nature. In this respect, expert witnesses are not subject to perjury proceedings if their evidence is proved false.

As regards the European Convention of Human Rights, article 6(3) (d) provides that “everyone charged with a criminal offence has the right to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses in his behalf under the same conditions as witnesses against himself”. This is part of his rights to a fair trial.” In the case Trivedi v United Kingdom³¹⁶, the applicant was a doctor who was charged with false accounting and the prosecution had relied on evidence from a patient that Mr Trivedi had given him some prescriptions on one single visit, and had not attended him on a number of visits as the doctor had claimed. The patient was an elderly man and the prosecution provided a medical report stating that the patient was too ill to give oral evidence. The defence objected to this but the judge admitted the patient’s statement on the ruling of sections 23 and 26 of the 1988 Criminal Justice Act.

France, Germany and US Double Jeopardy Rule

German law allows every German citizen to be tried in any country in which he resides. Therefore, a person can be tried in Germany for a crime and be tried for the same crime in the USA or England, for example. This does not breach the double jeopardy rule, if the USA precedent is taken that different sovereigns can try the defendant for the same accusation.

³¹⁵ J.H.Wigmore., A treatise on the Anglo – American System of Evidence, (Stevens Publishers, London, 1940)

³¹⁶ Trivedi v United Kingdom [1997] 89 A.D.R.136.

In America, being tried twice for the same offence is prohibited by the 5th Amendment of the United States Constitution. The ‘double jeopardy’ clause protects against three distinct abuses:

- (i) a second prosecution for the same offence after acquittal;
- (ii) a second prosecution for the same offence after conviction;
- (iii) and multiple punishments for the same offence³¹⁷.

However, in the USA, there can be separate punishments in multiple criminal prosecutions if the punishments are not based on the same offences and this does not violate the ‘double jeopardy’ clause³¹⁸.

However, a criminal conviction following civil forfeiture does violate the Double Jeopardy Rule. In the case US v User [1995], the 6th Circuit Court of Appeals reversed the criminal conviction of a marijuana grower *on double jeopardy grounds* when his home was forfeited in a settlement agreement and then a criminal indictment was brought afterwards. The court compared the civil settlement agreement to a plea agreement in a criminal case. Since the days of prohibition, *the US courts had always regarded forfeiture as not being a punishment and consistently regarded forfeiture plus imprisonment as being different things and so not a breach of the double jeopardy clause* until the User case.

For example, a substantive crime and a conspiracy to commit that crime are seen as two different US offences and so do not violate the US double jeopardy clause³¹⁹.

The double jeopardy rule here protects against multiple punishments for the same offence³²⁰. Criminal procedure should be fair and adversarial and preserve a balance between the rights of the parties.

The French do not derogate the double jeopardy rule; their criminal system allows for a victim of an offence who has suffered damage to go before the criminal court as

³¹⁷ US v Harper, 490 US 435, 440 (1989)

³¹⁸ Blockburger v US, 284 US 299 [1932]

³¹⁹ US v Felix, 112 S.Ct. 1377 [1992]

³²⁰ Justices of Boston Municipal Court v Lydon, 466 US 294, 306 [1984]

a *partie civile* by starting a criminal proceeding or by joining the state in a criminal proceeding if it is already pending, in order to demand compensation.

A natural person or a legal person may bring a civil action against a defendant for compensation for a criminal offence. A natural person can bring a civil action in order to obtain compensation for personal damages and a legal person can bring a civil action if he can show direct damage, for example, in the case of an abuse of trust committed by one of its representatives. Even a non-profit organisation such as a trade union can bring a civil action if it can establish the existence of damage, direct or indirect, and can be compensated for collective damages. Therefore, a victim can claim damages caused by a criminal offence in a French criminal or civil court. The objectives of bringing a civil action before a criminal court are to obtain a ruling on the guilt of the person and to obtain compensation on a claim for damages. Admissibility of the civil action does not automatically imply that damages will be awarded, but on the other hand, compensation awarded by the criminal court means that the defendant is convicted of the criminal offence.

France - Hearsay Evidence

France has ratified the Human Rights Convention and the rule excluding hearsay applies in France. The rule applies to documentary evidence by way of a witness statement given at trial instead of oral evidence. In the case Delta v France³²¹ the prosecution had relied on the statements of the victim and another witness who had been summoned to attend and had failed to do so and the judge made no effort to have them brought before the court. At the trial, only the police officer who had arrested Delta came as a witness to give evidence and the two girls did not attend even though they had been summoned to court. Delta was convicted and appealed. He made a further appeal to the Court of Cassation, alleging violation of ECHR article 6 (3) and the European Commission found that there had been a violation of article 6. This case outcome differs vastly from the ECHR's case outcome in the English case of Trivendi v United Kingdom because the patient in the Trivendi case was genuinely ill, could not attend, and was not summoned to court.

³²¹ Delta v France [1990] IIHRL 12.

Hearsay evidence can be seen in documents and other business transactions such as the modern electronic data interchange (IDS) systems of doing business. French contract law requires that all business transactions must have written proof; it would mean that electronic transactions could be classed as hearsay evidence, unless France brings EDI for electronic trading as an exception to the hearsay rule.³²² Until organisations worldwide put well-documented IT security policy in place and are monitored for security violations, such evidence can be tampered with³²³.

Germany Hearsay Evidence

Hearsay evidence is inadmissible in Germany. German law interprets Article 4 of Protocol 7 of the ECHR as being absolute protection.

US- Hearsay Evidence

The American Constitution Sixth Amendment Confrontation Clause states:

“In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him.” The Federal Evidence Rules of the Supreme Court give definitions and in Rule 801,³²⁴ it states “hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”

An example of hearsay evidence is the case of United States v Hernandez³²⁵. This case illustrates the importance of *conduct* as implying an assertion. However, nothing

³²² However, not all electronic evidence is hearsay evidence as hearsay electronic evidence is so not because it is electronic but because it was made in the course of running a business. When it directly relates to the crime, it is not hearsay. For instance, electronic statements of a business credit card is hearsay if brought into court to reveal just one particular transaction in question, but is not hearsay if a director had set up such an account for fraudulent purposes and had so used it.

³²³ See article Accountingweb, “Keeping it secure and complying with SOX”, Accountingweb.com, 4th May 2005.
See also Article in Securitysa.com, “Trends in Digital evidence handling”, <http://www.securitysa.com/Article.ASP?pkArticleID=2973&pkIssueID=457>

³²⁴ FRE Rule 801 (definitions)

The following definitions apply under this article:

- (a) Statement – A “statement” is (1) an oral or written assertion or (2) the nonverbal conduct of a person, if it is intended by the person as an assertion.
- (b) Declarant – A “Declarant” is a person who makes a statement.

³²⁵ US v Hernandez, US Court of Appeals, 5th Circuit, 1985, 750 F.2d 1256.

is an assertion unless it is intended to be one. The conduct of a person can be entered into hearsay evidence if a person acts “as if” their belief leads them to infer something that needs to be proven. In America, there are exceptions to the hearsay rules. The law of evidence is *codified* in both the states of Illinois and New York. The codification of the law of evidence in Illinois and New York is contained in court practice manuals and seems to be successful overall.

While the Federal Rules of Evidence did not independently address the admissibility of electronically stored evidence (ESI) before 2006, this has changed with the 2006 Amendments to the Federal Rules of Civil Procedure.

Rule 16: Establishes a process for addressing early in the proceedings, any issues pertaining to the disclosure of ESI e.g. both parties intend to deal with ESI evidence.

Rule 26: Defines the responsibility of a party to disclose ESI evidence early in the proceedings. It also explains the responsibility for identifying the sources of information when a party feels that some ESI is impractical to produce, and clearly outlines a requirement to discuss any issues related to disclosure of ESI. When you are sued, you may only be provided with as little as 30 days notice.

Rule 33: Stipulates that an interrogatory review of business records must include ESI. Therefore, with this amendment, there is no longer any doubt that evidence requested of you during a civil suit, must include e-mail messages, if they are relevant.

Rule 34: A requesting party can specify the form of production of e-mail evidence. In other words, the other party may specify that the e-mails you are to produce in discovery, must be in their original format, and not a representation of the message such as a printout or an image (e.g. TIFF, PDF).

Rule 37: Provides protection from sanctions when information is lost during routine "good faith" operations. But since routine deletion of potential evidence through regular deletion of e-mail messages from the mail-server (the "Smoking Gun") can hardly be considered as "good faith", this effectively puts an end to this age-old corporate legal tactic.

Rule 45: Imposes responsibility on a party when subpoenaed to include ESI in its searches. The subpoena may specify the form of e-mail evidence. But, be aware that

when the form of e-mail messages is not specified, that anything other than original form may lead to a challenge of authenticity (e.g. "Chain of Evidence").

In a conspiracy fraud trial, the issues will revolve around the admissibility of statements by the alleged conspirators. Illinois has a co-conspirator hearsay exception rule. In Illinois, the elements for admissibility³²⁶ are- (1) proof of any act or declaration, (2) by a co-conspirator or defendant; (3) committed in furtherance of the conspiracy (4) during its pendency, provided that a foundation for its reception is laid by independent proof of the conspiracy³²⁷.

Co-conspirator statements, (hearsay evidence), are admissible. In the case of Ohio v Roberts³²⁸, statements by various alleged conspirators were admissible. It is not necessary that a co-conspirator testify before his statement may be used against the defendant³²⁹. In Illinois there does not even have to be a conspiracy charge for an alleged co-conspirator statement to be used. The charge may be another criminal charge, but if the prosecution decide that there was a conspiracy to commit that offence, they would use such statement at trial³³⁰. However, there must be independent proof of such conspiracy. Such 'independent' proof can be shown by non-hearsay evidence that two or more persons were engaged in a plan to commit a criminal offence. This conspiracy can be inferred by the surrounding facts and circumstances³³¹. The only case that was the exception to the state's admitting such hearsay statements was the case of Cochrane's of Champaign Inc v State of Illinois Liquor Control [1995] where the appellant was charged with selling alcohol to under-age persons. In this case, the prosecution did not prove the purchasers' age by competent evidence and only inadmissible hearsay evidence was introduced to establish the ages of the buyers. In addition, the buyers were unavailable in court

³²⁶ "When men enter into an agreement for an unlawful end, they become ad hoc agents for one another, and have made a 'partnership in crime'. What one does pursuant to the common purpose, all do, and, as declarations may be such acts, they are competent against all". Quoted in Bourjaily v US, 483 US171, 190 [1987] from the judgement in Van Riper v US, 13 F 2d 961, 967 (2d Cir).

³²⁷ People v Eddington, 129 Ill. App.3d 745, 473 N.E.2d 103 (4th Dist. [1984])

³²⁸ Ohio v Roberts, 448 US56 [1989]

³²⁹ People v Melgoza, 231 Ill App.3d 510, 595 N.E.2d (its Dist. [1992])

³³⁰ People v Goodman, 81 Ill.2d 278, 408 N.E. 2d 215 [1980].

³³¹ People v Miller, 128 Ill App.3d 574, 470 N.E.2d 1222 (2nd Dist. [1984])

because they were protected by the informer's privilege. In Illinois, business records, which feature greatly in fraud trials, are classed as hearsay evidence because they were not created primarily for use as evidence. However, experts' reports, such as forensic reports, are classed as evidence.

The position is similar for New York as regards conspirators but in other circumstances, hearsay evidence is excluded. Hearsay evidence, though, was admitted in an appeal against a murder conviction when a person was released because another person admitted to the murder many years later; that person however elected to uphold his Fifth Amendment rights and chose to remain silent when interrogated by police; he could not then be charged with the offence³³².

In 2003, New York enacted a Bill, which codifies as an exception to the hearsay rule all statements made under belief of impending death³³³. Such deathbed statements are now admissible as evidence in all civil and criminal trials and other proceedings before law. The impact of this is yet to be seen, but such evidence will be weighted alongside other corroborative evidence.

Hearsay Evidence – A Critical Analysis

The concept of hearsay is a broad concept³³⁴. In principle, it includes not only the oral statements of third parties, but also any written statement by a non-witness. The French do not accept that the transcript of an interrogation, when written by the police, is hearsay evidence and the extra-judicial confession of the accused, is admissible against him as evidence of the offence.

³³² Morales v Portuondo, [1997] Civ.2559

³³³ March 2003 Bill A 07440

³³⁴ Although there are no English cases decided on the fact that a criminal court report of another country's is in a court in England, hearsay evidence, this is the case in the United States. In one such case, a model train manufacturer, Mike's Train House, claimed that its Korean manufacturer used its trade secrets in work for a competitor, Lionel. Employees of the Korean manufacturer were convicted on criminal charges in Korea. Mike's Train House then brought a civil action in the U.S. against both Lionel and the Korean entities. In December, 2006, the Sixth Circuit Court of Appeals ruled that plaintiff's expert gave testimony that should not have been admitted because it was hearsay based on the report of the special master in the Korean criminal actions. Mike's Train House, Inc. v. Lionel, L.L.C., 472 F.3d 398 (6th Cir. 2006). Thus, a new trial was ordered. See <http://www.ca6.uscourts.gov/opinions.pdf/06a0457p-06.pdf>

In the UK, admissible hearsay statements are those made to the police by witnesses who are unable to give evidence at trial, unless it was obtained in the circumstances covered by section 76 of the Police and Criminal Evidence Act 1984 (PACE) or unless the judge excludes it using his discretionary power under section 78³³⁵.

Section 76 PACE states

“(1) In any proceedings a confession made by an accused person may be given in evidence against him in so far as it is relevant to any matter in issue in the proceedings and is not excluded by the court in pursuance of this section.

(2) If, in any proceedings, where the prosecution proposes to give in evidence a confession made by an accused person, it is represented to the court that the confession was or may have been obtained –

- (a) by oppression of the person who made it; or
- (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof, the court shall not allow the confession to be given in evidence against him except in so far as the prosecution proves to the court beyond reasonable doubt that the confession (notwithstanding that it may be true) was not obtained as previously mentioned.

“(3) In any proceedings where the prosecution proposes to give evidence a confession is made by an accused person, the court may of its own motion require a prosecution, as a condition of allowing it to do so, to prove that the confession was not obtained as mentioned in subsection (2) above.

(4) The fact that a confession is wholly or partly excluded in pursuance of this section shall not affect the admissibility in evidence–

- (a) of any facts discovered as a result of the confession; or

³³⁵ Section 78 of PACE states: “Exclusion of Unfair evidence. (1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. (2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.

- (b) where the confession is relevant as showing that the accused speaks, writes or expresses him in a particular way, of so much of the confession as is necessary to show that he does so.
- (5) Evidence that a fact to which this subsection applies was discovered because of a statement made by an accused person shall not be admissible unless evidence of how it was discovered is given by him or on his behalf.
- (6) Subsection (5) above applies-
 - (a) to any fact discovered as a result of a confession which is wholly excluded in pursuance of this section; and
 - (b) to any fact discovered because of a confession, which is partly so excluded, if that fact is discovered because of the excluded part of the confession.
- (7) Nothing in Part IV of this Act shall prejudice the admissibility of a confession made by an accused person.
- (8) In this section “oppression” includes torture, inhuman or degrading treatment, and the use or threat of violence (whether or not amounting to torture).”

The hearsay rule exception in the UK is found in the Criminal Justice Act 1988. The judge can give leave to include inadmissible statements, the judge having discretion to exclude the evidence if he considers it contrary to the interest of justice for it to be heard. The hearsay rule has been derogated. There are now fourteen complex exceptions to the rule^{336 337} in civil procedure in the UK, the hearsay rule has largely been abolished by the Civil Evidence Act 1995. The 1997 Law Commission produced a set of proposals to relax the hearsay rule³³⁸. This is all but a derogation of article 6(3) (d) of the European Convention of Human Rights.

Germany upheld the hearsay rule since the nineteenth century and still upholds it in its Code of Criminal Procedure, the StrafprozeßBeordnung (StPO). Article 250 of the

³³⁶ R May, Criminal Evidence, (Blackstone Press, London, 1999)

³³⁷ JH Wigmore, Evidence at trials at common law,(Boston Press, USA, 1990)

³³⁸ Law Commission, “Evidence in criminal proceedings: hearsay and related topics”, Report No. 245, 1997.

StPO states: “If evidence of a fact is based upon a person’s observation, this person shall be examined at trial”.

In France, hearsay is generally admissible under certain conditions. Documentary electronic evidence is treated as hearsay evidence. In the French *Cour d’Assises*, witnesses are expected to give evidence orally. However, the president of the court may read the statement of an absent witness. In France, nothing prevents a witness from repeating the statements of other people in the course of his evidence. By the French Code of criminal Procedure, the judge has the responsibility of seeking out the evidence. In serious cases such as serious fraud, it is *the juge d’instruction* who invokes the assistance of experts and who defines what part they are to play and it is to him that the defence turn if they want a particular line of enquiry followed up.

This is not the case in the UK where no judge conducts a search for evidence. In the UK, the role of the judge is reactive and it is the parties and only the parties who are responsible for seeking out the evidence. The Criminal Procedure and Investigations Act 1996 gives the police in England a Code of Practice in the matter of disclosure of evidence³³⁹. Article 3(4) of this Code of Practice states: “*In conducting an investigation, the investigation should pursue all reasonable lines of enquiry, whether they point towards or away from the suspect.*” It can be said that this makes the English system for serious criminal cases such as serious fraud similar to the French position in serious crimes where the police in the UK and the judge in France must find all the evidence.

However, the English common law accusatorial tradition is very different from the French and German inquisitorial system. The French and German tradition seems heavily compliant with the European Convention on Human Rights whilst the English system has moved towards derogation of the human rights of article 6(3) (d) on hearsay rule. The English system inexplicably claims justification in the principle of freedom of proof, that is, the truth. What the English system has ignored is the old idiom, stated by Lewis and Hughman³⁴⁰ in 1975:

³³⁹ Section 23(1) Criminal Procedure and Investigations Act 1996.

³⁴⁰ D.Lewis. and P.Hughman. Just how just? (Secker and Warburg, USA,1975.)

“Hearsay evidence is excluded, not because it is regarded as valueless, but because lawyers have feared that juries might attach undue weight to it”.

In a respect the UK treats, electronic digital evidence as true evidence and not like the French, as hearsay evidence, even though there are practically no secure controls or security policies in UK business electronic systems yet³⁴¹.

The essential difference in the French and the English system is nicely stated by Lord Denning in Jones v National Coal Board³⁴², where he said “In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation and determine the issues raised by the parties...”

In the recent English case Roman Polanski v The Conde Nast Publication Ltd [2003] (11th November 2003), video conferencing was used as hearsay evidence. Roman Polanski had brought a defamation case in the jurisdiction of the United Kingdom. The question was whether he could do so *in absentia* from France because he is a fugitive from the US criminal justice system, which has an extradition agreement with the United Kingdom. The English Civil court decided to allow this evidence by video conferencing which is electronic evidence but live, enabling the witness, not physically present in the UK, to be questioned by the judge and his lawyers and the defence’s lawyers. Such evidence would not affect an Appeal, which must be founded only on a point of law, although it could become cause for a retrial if the defendant alleges that the video evidence was incomplete. In this case, the status of the video evidence, treated as photograph evidence, will have to be considered. Video evidence in the UK is treated as real evidence, not hearsay evidence. Therefore, video evidence is not a statement. Were there to be a retrial because of doubts as to Polanski’s identity in the video evidence, there are a few cases to support the treatment of videos or photos as real evidence. Lord Morris in Sparkes v

³⁴¹J. Murray, “Stop Staff fraudsters and save billions”, IT week, 2nd Dec.2005. In this article, the Association of Fraud Examiners of the UK estimated that £72 billion could be defrauded by employees this year.

See also, D.Thomas, “Hi-Tech crime issues warning on lax securities,” NHTCU, 6.5.05.

See also J. Murray, “Employers leave gaps for in-house fraudsters”, IT Week, 24.11.05

³⁴² Jones v National Coal Board [1957] 2 QB 55.

R³⁴³ stated that there is no rule, which permits the giving of hearsay evidence merely because it relates to identity. By analogy, in R v Okorodu³⁴⁴ a photo fit picture, which was constructed by a witness, who subsequently failed to pick out the accused in an identification parade, was admitted into evidence.

The Criminal Justice Act 2003 on double jeopardy and prosecution appeals³⁴⁵ is aimed at rebalancing justice in favour of victims, witnesses and communities. This Act deals with police powers, drug testing requirements, bail, conditional cautions, sentencing, disclosure, evidence, mode of trial and juries. This was enacted with no problem, even though the same law was mooted and disapproved of in 1974 when the UK Law Commission looked into the matter and concluded that there should be a prosecution right of appeal only where the submission of no case succeeded on the basis that there was no evidence that the alleged offence was committed by the defendant, and not when the effect of the submission was that the prosecution evidence, taken at its highest, was such that a properly directed jury could not properly convict on it.

The UK, like France, Germany and the US can remove legal privilege and treat documentary evidence as hearsay evidence, as in R v Governor of Brixton Prison (ex parte Levin) [1999]. On 5 May 1995, the Secretary of State signified to the metropolitan magistrate that a requisition for Mr. Levin's surrender had been made by the Government of the United States, stating that he was accused of various extradition crimes within the jurisdiction of the United States and the metropolitan magistrate, pursuant to paragraph 6(1) of Schedule 1, Extradition Act 1989 the extradition case was heard. The magistrate said, "Paragraph 7(1) provides that if such

³⁴³ Sparkes v R [1964] AC 964

³⁴⁴ R v Okorodu [1982] Crim LR 747

³⁴⁵ See Criminal Justice Act 2003, Part 10, section 40, which states: "This Part of the Act reforms the law relating to double jeopardy, by permitting retrials in respect of a number of very serious offences, where new and compelling evidence has come to light...". Section 41 states: "...and for a retrial to take place where the Court of Appeal is satisfied that the new evidence is highly probative of the case against the acquitted person...". The UK Criminal Justice Act 2003 (retrial for Serious Offences) Order 2005 came into force on 4th April 2005 by which a single judge will retry a case on application by a party. The Registrar has the power to order the production of any document, exhibit or other thing under section 80(6) (a) of the 2003 Act and to order a compellable witness to attend for examination.

evidence is produced as . . . would, according to the law of England and Wales, justify the committal for trial of the prisoner if the crime of which he is accused had been committed in England or Wales, the metropolitan magistrate shall commit him to prison, but otherwise shall order him to be discharged.” The metropolitan magistrate found that the evidence justified Mr. Levin's committal for trial for sixty-six offences including included four counts of theft and numerous counts of forgery, false accounting³⁴⁶ and computer misuse.

Mr. Levin moved the Divisional Court for the issue of a writ of habeas corpus. He claimed on various grounds that the evidence adduced before the magistrate did not justify his committal. Levin’s lawyers argued that the bank computer printouts were inadmissible because they were hearsay. They argued in Levin’s fight against extradition that in criminal proceedings, computer printouts would be admissible under section 69 of the Police and Criminal Evidence Act 1984, but that the Divisional Court had decided in Reg. v. Governor of Belmarsh Prison, Ex parte Francis³⁴⁷ that extradition proceedings were not criminal proceedings. Therefore, they argued, section 69 did not apply and the printouts remained inadmissible at common law. The decision was that the printouts are tendered to prove the transfers of funds, which they record. They do not assert that such transfers took place. They record the transfers themselves, created by the interaction between whoever purported to request the transfers and the computer programme in Parsipanny. The evidential status of the printouts is no different from that of a photocopy of a forged cheque and that extradition proceedings are criminal proceedings of a special kind. Importantly, this case emphasised the point that a magistrate has the discretion to make an exception to hearsay evidence, a discretion conferred by section 78(1) of the Police and Criminal Evidence Act 1984-

³⁴⁶ Although even in the US it has been argued that the accounting profession’s oligopoly and poor structure contribute to corporate fraud through false accounting. This is due to weaknesses that continue even after reforms Sarbanes-Oxley. See J.D.Cox, “The Oligopolistic Gatekeeper: The U.S. Accounting Profession”, (2005), Duke University Law School, Bepress Legal Series.

³⁴⁷ Reg. v. Governor of Belmarsh Prison, Ex parte Francis [1995] 1 W.L.R. 1121

"In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it."

In the UK now, a single judge may examine all the evidence and can try serious fraud cases. The certification of electronic evidence would make it admissible and rebuttable proof of the facts it contains; it would make the integrity of the manner in which the data was maintained less disputable. This certification can be done by the French way of appointing data protection officers in French companies. These officers' roles are to monitor the company's data protection practices with sufficient independence to alert officials if the law is breached. This however, only relates to personal data but would stop the theft of confidential banking and employment information³⁴⁸.

Conclusion to Chapter 5

The United Kingdom has decided to make exceptions to both the hearsay and double jeopardy rules with regard to serious crime, serious corporate fraud has being serious crime. The UK Human Rights Act 1998 allows for the derogation of the Human Rights Convention where it sees fit. The hearsay exception derives mainly from the principle that in a joint trial of several defendants, a judge has no discretionary common law power to exclude relevant evidence on the basis that its prejudicial effect to one accused outweighs its probative value to the other. The absolute right of a defendant to adduce relevant evidence can be qualified by the operation of an exclusionary rule; however, the emphasis that has been placed upon the prima facie entitlement to adduce relevant evidence suggests that an exclusionary rule should only be applied to the defence in limited circumstances and where this is required. These developments provide strong support for the argument that in a joint trial, a defendant should have an unfettered entitlement to adduce a co-defendant's confession, for instance.

³⁴⁸ R. Jacques, Man arrested over webcam spy Trojan, VNUNET.com, 19.1.2005.

The double jeopardy exception came out of the UK's Law Commission Report of 2001 titled 'Double jeopardy and prosecution appeals' and its recommendation that the Court of Appeal should have power to set aside an acquittal for murder and order a retrial where there is compelling new evidence of guilt and the Court is satisfied that it would be in the interests of justice to do so. It has been decided to extend this exception to all serious criminal cases including serious fraud. A change in the UK double jeopardy law came into force in April 2005 through provisions contained in Part 10 of the Criminal Justice Act 2003. This followed an examination of the double jeopardy rule and recommendations made by the Law Commission in 2001 (Double Jeopardy and Prosecution Appeals, Law Comm. Report No.267, 6 March 2001). Whilst the UK's interpretation of human rights is with some exception, France and Germany regard it as absolute protection. The double jeopardy principle is seen in France and Germany as "the consequence of the finality of the judicial decisions, defined by the exhaustion of the avenues of appeal, which are in principle available to both prosecution and defence"³⁴⁹.

³⁴⁹ M.Delmas-Marty & J.R.Spencer, eds., "European Criminal Procedures", (Cambridge University Press, Cambridge, 2002) on page 573.

CHAPTER 6 – FRAUD CASES

UK Fraud Cases

In the UK, where one man is solely responsible for the affairs of a limited company he cannot be convicted of conspiring with that company, as in the case of R v McDonnell³⁵⁰. McDonnell was charged with conspiring with a limited company. He was the sole director of that company. It is not a company which is here being proceeded against, it is an individual defendant; and, further, this is a criminal trial and one of gravity so that problems of difficulty must at all times be resolved favourably to an accused person.

“I have reached the conclusion that I should express the opinion or anticipatory ruling that these charges of conspiracy cannot be sustained on the footing that in the particular circumstances here, where the sole responsible person in the company is the defendant himself, it would not be right to say that there were two persons or two minds”, said the judge.

There have been very rare occasions when cases of serious fraud have been dismissed, as in the case of R (on the application of the Inland Revenue) v Crown Court at Kingston³⁵¹. This case was against Mr John, a tax partner at the accountants Ernst and Young who specialised in advising on tax-saving schemes. This particular tax-saving scheme involved the purchase by companies controlled by a Mr Leaf, of companies registered in England, the assets of which were solely cash and which had substantial corporation tax liabilities. The price paid for a target company reflected its tax liabilities as well as its cash assets. The scheme worked if relevant members of the group of companies into which the target company passed, being resident in the UK for a certain period and in Guernsey at other times. After acquisition, the target engages in large-scale profitable trading on the foreign-exchange market, borrowing very large sums from an independently owned bank, thereby incurring proportionately large liabilities for interest and declaring substantial dividends by the target company, justified by its profits on its foreign exchange dealings. Such tax schemes sold by the top accountants in the country, used to cause much anxiety in

³⁵⁰ R v Mc Donnell [1966] 1 All ER 193, Bristol Assizes.

³⁵¹ R v Crown Court of Kingston [2001] EWCH Admin 581.

the 1980's³⁵² when the charity law was used to neutralise tax liabilities. Recently there has been a series of accountants charged with tax schemes found fraudulent.³⁵³

France- Fraud Cases

As regards fraud, commercial fraud constitutes a criminal offence for which action can be brought before the criminal courts or the civil courts regardless of the nationality of the victim or the perpetrator. When a victim of a fraud can prove moral injury or property damages, French law gives the victim the right to demand reparation by bringing action before the criminal or civil courts. If the victim cannot prove the criminal character of the fraud, he will be entitled to seek reparation for damages only before the civil courts. If the criminal character of the fraud under the French criminal code is acknowledged, the victim may seek reparation under the criminal or civil courts. If the fraud is one of bid rigging, for example, Article 420-1 and 420-2 of the Commercial Code state that the punishment for this offence is four years imprisonment and /or a fine.

A recent well-publicised fraud, one of the world's biggest financial scandals was the fraud at the Credit Lyonnais Bank in Paris. The Credit Lyonnais bankers were bribed to make loans to dubious persons, these loans amounting to \$2 billion. The money was mostly used to buy the famous film company Metro Goldwyn Mayer in 1990. On investigation, the bank found other unsound loans made and it was forced to write off £35 billion in bad loans.

France has corporate frauds that come to court as contract issues. France ranks fourth in the export of manufactured products according to OECD reports and has an advanced trade in armaments, automobiles and transport products in general as well as in aeronautics and industrial equipment. This makes France exposed to foreign

³⁵² M.Gillard, *In the name of charity*, (Chatto & Windus, London, 1987).

³⁵³ see HM Customs & Revenue website , "Ian Foulkes jailed for tax fraud" and "Scottish accountant found guilty in Liverpool", 2005; see also "Aegis Trust Principals and others indicted in \$68 million fraud conspiracy following nationwide undercover investigation", US Department of Justice website 2004; also Washington Post, "Charged over tax shelters in KPMG case – 8 former KPMG LLP officials and a lawyer accused of helping wealthy clients evade billions of dollars in taxes in what authorities called the largest criminal tax fraud case in history", August 30, 2005.

markets where bribery and corruption are ingrained and may be the reason for more of this type of fraud. Because of the extent to which French companies are exposed to markets in which the payment of secret commissions is a frequent practice, its subsidiaries are exposed to fraud. For instance, the judicial investigation of the ELF case, when there was an enquiry into commission alleged to have been paid by a major French industrial group as part of a 1991 sale of French frigates in Taiwan, revealed the size of the commissions paid in connection with oil and armaments-related contracts. Commission was 25% of the deal and 2% of arms deals. In this case, it was found that over 150 million euros was paid annually to foreign decision makers. The OECD report stated that from 1990 to 2003 there were over 3,600 criminal convictions each year for economic and financial offences. Of these 100 cases a year are concerned specifically with bribery³⁵⁴, but with most of these bribes concerned with senior managers and employees of small limited companies. These frauds are not significant if analysed as part of all criminal convictions, which number one million per year in France.³⁵⁵

Germany- Fraud cases

In Germany, Customs Investigation Service, investigate import and export frauds and other frauds. Tax evasion falls under section 370 of the German Fiscal Code. Under German law, international tax evasion is punishable by a penal fine of up to 3.6 million Euros. If there are several different offences, 7.2 million Euros plus five years imprisonment and in particularly serious cases, ten years imprisonment. Any deception to the German fiscal authorities incurs criminal prosecution or an administrative fine. Offences under general criminal law such as bribery, falsification of documents, false recording by a government official, are investigated by the police. If the German offence can be proved unintentional or grossly negligent, it falls and is then deemed a contravention of administrative regulations. This carries a maximum fine of 100, 000 Euros. Contravention of administrative regulations include

³⁵⁴ See J.M.Hadden, "Swimming against a tide of fraud in France", Gazette, 104/10, 8 March 2007. He reviewed the book "Justice under siege- One woman's battle against a European Oil Giant" by Eva Joly. The book concerned corruption at the petrol multinational Elf Aquitaine. Almost £2 billion was defrauded.

³⁵⁵ See Criminal Records Office figures for economic and financial offences, Infostat Jurist No. 62, June 2002. See also Ministry of Justice website <http://www.justice.gouv.fr/chiffres/cles02.htm>

issuing incorrect documents, making incorrect or incomplete statements to obtain licences, failure to submit business data, and refusal to permit inspection of papers and other documents.

The perpetrator of German fraud is any human being. Only *a natural person can act and incur guilt, not a legal person* such as a corporation or a limited-liability company. Companies act through their executives, their boards of managers and German law only recognises these natural persons for the offences of fraud. The punishment for fraud offences is an administrative fine against the corporation, which benefited from the offence and this depends on the criminal energy displayed by the company employees who committed the fraud and the profit derived from the financial situation of the company. Importantly, the type of company, its internal organisation or its limited liability status has no influence on the setting of the fine.

In Germany, liability of corporations exists but only in respect of those offences which can be committed negligently but not intentionally. Corporations can only be prosecuted under administrative law not criminal law. In 2002, Germany enacted the German Securities Trading Act by way of the Fourth Financial Market Enhancement Act. The German Federal Ministry of Finance is authorised to enact a detailed regulation in connection with the prohibition of price manipulation, enacting the EC Market Abuse Directive. It is prohibited to provide incorrect or misleading information, which is material for the valuation of assets, or to conceal such information. Material valuation circumstances are generally defined as facts and value judgements that are suitable to influence the investment decision of a reasonable investor with average knowledge of the stock exchange business. Pursuant to section 20a of the German Securities Trading Act, other fraudulent acts to influence the stock exchange price of assets are prohibited. The regulation distinguishes between misrepresentation, distortion or suppression of information. All three categories are prohibited activities. The regulation provides the following examples of other fraudulent transactions:

transactions in which the purchaser and seller are identical;

collusive action between purchaser and seller with regard to price and unit;

transactions that create a false impression about turnover based on commercial considerations or about supply and demand in certain circumstances;

exploitation of a market dominating position;

spreading of incorrect rumours or recommendations that are likely to lead to acquisition or sale of securities.

The German Investment Act 2003 Act provides, for the first time, a legal framework for the admission and regulation of hedge funds and it is now possible to outsource certain business activities.

Like France, Germany has restitution and it is used in cases of white-collar crime. The restitution is not determined by the offender's resources but by the amount of damage. Section 46(a) of the German Penal Code provides for the reduction of fines in exchange for restitution only when the offender has made considerable personal effort, regardless of whether the restitution was full or partial. When such restitution occurs, the defendant is not formally declared guilty³⁵⁶.

US Fraud Cases

Organisations and individuals are prosecuted by the Department of Justice for violation of Section 1 of the Sherman Act (for price fixing and bid rigging). Criminal anti trust penalties have been high since the 1970's at \$ 1 million fine and three years imprisonment. A study by Cohen (1991) found that organisations represented only 1% of the estimated 200, 000 federal criminal defendants per year³⁵⁷. An example of modern American corporate fraud is the 2001` Enron collapse.

³⁵⁶ It is to be noted that no such provisions are to be found in the English system and the very first fraud case in which the Proceeds of Crime Act has enabled restitution to victims in England is the case of R v Peter Barry Maude [2001] Unreported.

³⁵⁷ K.M.Jamieson., *The organisation of corporate crime*, (Sage Publications. London,1994.)

The ENRON fraud resulted in the following criminal cases, this list not being the comprehensive list.

Case	Date	Details
In Re: Enron Corp.	Dec. 2, 2001	Voluntary Chapter 11 Petition
Committee of Unsecured Creditors v. Kopper, et al	Aug. 26, 2002	Committee. of Unsecured Creditor's Complaint
Committee of Unsecured Creditors v. Kopper, et al	Aug. 26, 2002	Bankruptcy Court TRO against Kopper
In Re: Enron Corp.	July 11, 2003	Joint Plan Of Affiliated Debtors Pursuant To Chapter 11 Of The United States Bankruptcy Code
Samson Investment Co. v. Arthur Andersen, LLP	Jan. 15, 2002	Petition
U.S. v. Arthur Andersen, LLP	March 14, 2002	Indictment
U.S. v. Duncan	April 6, 2002	Cooperation Agreement
US v. Arthur Andersen, LLP	April 9, 2002	Order Denying Andersen's Motion to Quash Subpoenas
US v. Arthur Andersen, LLP	May 2, 2002	Government's Memorandum Of Law In Opposition To Media Petitioners' Petition For The Release Of Grand Jury Document
US v. Mulgrew, et al	June 27, 2002	Affidavit in Support of Criminal Complaint
US v. Kopper	Aug. 21, 2002	Cooperation Agreement
USv.DavidBirmingham, Giles Darby, and Gary Mulgrew	Sep. 12, 2002	Indictment UK bankers charged over dealings with Enron's Michael Kopper
US v. Fastow	Oct. 1, 2002	Criminal Complaint
US v. Belden	Oct. 17, 2002	Plea Agreement
U.S. v. Fastow	Oct. 31, 2002	Indictment
U.S. v. Richter	Feb. 4, 2003	Plea Agreement
S.E.C. v. Howard and Krautz	Mar. 11, 2003	Complaint
U.S. v. Howard and Krautz	Mar. 26, 2003	Grand Jury Indictment (broadband fraud)

U.S. v. Kenneth Rice, et al.	Apr. 29, 2003	Indictment
U.S. v. Andrew Fastow, et al	Apr. 30, 2003	Indictment
U.S. v. Ben Glisan	Sep. 10, 2003	Plea Agreement
U.S. v. Bayly, et al(Ex-Merrill Lynch Execs)	Sep. 16, 2003	Indictment
U.S. v. Bayly, et al. (Ex-Merrill Lynch Execs)	Oct. 14, 2003	Indictment -- The 'Enron Barge Case
U.S. v. Reiker	May 19, 2004	Plea Agreement
U.S. v. Lea Fastow	Jan. 14, 2004	Plea Agreement
U.S. v. Jeffrey Skilling and Richard Causey	April 21, 2004	Prosecutors' Motion to Modify Skilling's Bail
U.S. v. Jeffrey Skilling and Kenneth Lay	Dec. 28, 2005	Memorandum opinion and order denying Skilling's motion to dismiss insider dealing charges.
U.S. v. Kenneth Lay, et al.	July 7, 2004	Indictment
U.S. v. Richard Causey	Jan. 21, 2004	Indictment
U.S. v. Richard Causey	Dec. 28, 2005	Plea Agreement

Sources: various reports about Enron- Findlaw website; WhiteHouse website; SEC website and law firms' websites gave information that enabled the writer to create this table.

Enron³⁵⁸, formed in 1985, was a regulated natural gas company of the United States and one of the world's largest energy traders³⁵⁹. In the year 2000, Enron had 21,000 employees and a turnover in excess of \$100 billion when it dealt with the energy Dynergy³⁶⁰, and due diligence revealed it could go bankrupt. Its profits had been due to accounting falsification. Arthur Andersen, Enron's auditors, helped to perpetuate this fraud³⁶¹. They were found guilty³⁶² of obstructing justice and fined \$500,000³⁶³

³⁵⁸ Caselaw relating to the Enron fraud are in the public domain on the SEC website, on the Whitehouse website and on Law websites and search engines.

³⁵⁹ S.A.Forest, "Jeffrey Skilling's surprising split from Enron", (2001), BusinessWeek, News Analysis, August 15, 2001. Enron pioneered the use of risk management products and new contracting structures in the natural gas industry.

³⁶⁰ Reuters, "Enron, Dynergy confirm possible merger talks", (2001), November 9, 2001. Enron was by this time suffering from investor doubts and announced talks with its trading competitor ,Dynergy. The deal was to be a 'stock swap', valued at \$8 billion, with an introduction of \$1.5 billion capital from Chevron Texaco Corp which owned 26.5% of Dynergy. By November 2001, Enron had restated its accounts to reflect \$1.2 billion reduction of shareholder equity.

³⁶¹ Some key statements from the Court decision on Anderson were as follows:-

" 'knowledge' and 'knowingly' are normally associated with awareness, understanding or consciousness"

³⁶² BBC, "Anderson guilty in Enron case", June 15, 2002.

³⁶³ BBC, "Enron auditor fined \$500,000", October 16, 2002.

and they have pledged to stop auditing publicly traded firms as from 31st August 2002. Wall Street pumped up Enron's stock price³⁶⁴ and repeated Enron management's claims and the SEC did not even bother to check Enron's filed accounts³⁶⁵.

Some of the most significant problems evident in the Enron case are still apparent in companies, which reveal they are fraudulent. Enron convinced the public that a failing company, heavily in debt and losing cash, was actually one of the most profitable and innovative companies³⁶⁶ in the world³⁶⁷. Enron was a company built on deregulation³⁶⁸. Some major companies like Columbia Gas Transmission of Kentucky could not adjust to the rapidly changing market and perished³⁶⁹. Others thrived, and none more than Enron.

Enron exploited inefficiencies, stepping into the middle between producers and users and rationalizing the entire market. The company captured a huge percentage of the market and pocketed substantial profits. By the early 1990s, Enron was the leading natural gas company in the United States. Enron's success in this rapidly deregulating natural gas sector held the key to the company's ultimate demise. Other companies watch the market leader's operations, copy its innovations, and compete for the same business. Companies such as El Paso and Dynergy monitored Enron closely and based their own business models on Enron's but by 1993, Enron's profit margins in gas began to decline. Enron's water subsidiary, Azurix³⁷⁰, was persuaded to enter the water market in Latin America. In India, Enron's Dabhol³⁷¹ power plant never became operational, with an ultimate cost to Enron of almost \$1 billion. Enron's

³⁶⁴ BBC, "Enron probe targets Wall Street", Feb 20, 2002.

³⁶⁵ BBC, "US regulators 'short of cash'", March 5, 2002. David Walker, chief General Accounting Officer, SEC, said that in 2001, the SEC reviewed only 16% of the annual corporate filings it received...

³⁶⁶ BBC, Q & A: Enron's plight", January, 10, 2002. The ingenuity of Enron was its realisation that energy, water, telecom broadband, and gas were commodities that could be bought and sold and hedged just like shares and bonds.

³⁶⁷ Revelations of widespread accounting shenanigans designed to deceive investors and regulators created a crisis of confidence in corporate America. See M.F.Starr, "The Post-Enron CEO: It's Lonely At the Top", Smith, Gambrell & Russell, LLP, Atlanta Office, May 2, 2003. www.martindalehubble.com

³⁶⁸ BBC, "Enron timeline", March 5, 2002. "In the 1980's, energy corporations lobbied Washington to deregulate the energy business."

³⁶⁹ <http://www.EPA.gov>. Twenty-eight companies and their subsidiaries, all gas pipeline operators, requested that RSPA waive the safety standards in 49 CFR 192.713(a) and 192.485 for gas transmission lines operating at 40 percent or more of specified minimum yield strength (SMYS). The operators requested the waiver to get permission to repair the lines with Clock Spring. The request came in a November 22, 1993, petition submitted by the Interstate Natural Gas Association of America (INGAA), a gas pipeline trade association.

³⁷⁰ K. Merchant, R.Wright; T.Catan and G. Robinson, Financial Times, "Enron chief scorned in asset division", February 11, 2002. Azurix was an Enron venture aimed at replicating in the water business Enron's supposed successes in the energy market.

³⁷¹ T.Allison, "Enron's eight year power struggle in India", Asia Times, January 18, 2001.

telecommunications division, Enron Broadband Services³⁷², lost at least another \$1 billion within two short years.

Enron chose debt, borrowing \$30 billion over a few years³⁷³. Publicly traded companies are required to report their debt positions to the SEC³⁷⁴, and this can have a huge impact on the company's fortunes. If, for example, a company raises billions of dollars on the capital markets over a very short period, credit rating agencies will lower the company's credit rating, as happened in late November 2001 when credit agencies caused access to funds to be blocked and Enron went bankrupt³⁷⁵.

There are very few objective sources of information available to investors about any particular company. Investors, stock analysts, and business journalists are forced to base their judgments largely upon the company's own statements-its press releases, annual meeting statements, stock analyst presentations, and, above all, the financial statements it files with the SEC. In the Enron case, investors had no idea that Enron was heavily in debt and losing money fast. Enron did not tell them. Failure to disclose³⁷⁶ is one method of perpetrating financial fraud. The company supported this narrative by disclosing hard financial data covering basic performance metrics, such as the amount of company's debt, revenue, and cash flow. Companies are required to report information accurately and in compliance with "generally accepted accounting principles (GAAP)"³⁷⁷. In late 2001, William Powers, Dean of the University of Texas Law School, joined the Enron Board of Directors and began to investigate the true condition of the company³⁷⁸. What he found, he later testified before Congress, was "a systematic and pervasive attempt by Enron's Management to misrepresent the Company's financial condition"³⁷⁹.

Enron's narrative descriptions of company operations in "10-Q and 10-K MD&A" disclosures were misleading³⁸⁰. Ultimately, however, a company's narrative disclosures are less important than the hard financial data included in the financial

³⁷² C.Johnson, "Enron Broadband chief makes deal", Washington Post, September 1, 2004.

³⁷³ J.Chaffin & S.Fidler, "Enron revealed to be rotten to the core", Financial Times, April 8, 2002.

³⁷⁴ R.K.Herdman, "Testimony concerning Enron's recent restatements", SEC, December 12, 2001. He said : "In its November 8, 2001 Form 8-K filing, Enron announced its intention to restate previously issued financial statements dating back to 1997. Various groups have reported increases in the number of companies restating their financial statements over the last several years, with one study citing 233 restatements in 2000".

³⁷⁵ It was this same rapid borrowing that caused the British business Finelist plc to go into administration in 2002.

³⁷⁶ U.Chandra, M.Ettredge, M.S.,Stone, Mary, "Enron era – disclosure of off Balance Sheet Accounting", Accounting Horizons, 1.2.2006.

³⁷⁷ Non-compliance with generally accepted accounting rules is another traditional method of corporate fraud.

³⁷⁸ University of Texas, School of Law <http://www.utexas.edu/law/faculty/wpowers/> . The Dean is an expert in torts, Professor Powers is especially well-known for his writings on products liability, a field in which he remains active in cutting-edge litigation

³⁷⁹ A non-executive board director was the person to first discover the fraud situation – another independent.

³⁸⁰ According to statements by the administrator.

statements. The Enron case demonstrates that if a company wants to deceive investors, it can easily do so by manipulating its publicly disclosed financial data – the crux of the Enron fraud.

Enron desperately needed billions of dollars of cash to meet the company's exploding costs, compensate for its poor business performance, and fuel its diversification strategy. If the company met these cash needs through traditional means, such as additional stock offerings or loans, investors reading Enron's financial statements would quickly realize that Enron was not making enough money to pay for its operations and the company's stock price and credit rating would decline accordingly³⁸¹. So senior Enron executives set out to manipulate Enron's reported financial data to improve the company's apparent financial success. "Our purpose was to mislead investors and others about the true financial position of Enron and, consequently, to inflate artificially the price of Enron's stock and mainly Enron's credit rating," said Andrew Fastow, CEO, in court.

"I and others at Enron engaged in a conspiracy to manipulate artificially Enron's financial statements."

In a securities fraud case, a company wishing to mislead investors simply reports inaccurate financial data to the SEC and to investors. Enron's deception was significantly more sophisticated.

One of Enron's methods of accomplishing this trick was to create a financial transaction³⁸² called a "prepay". Enron could simply borrow the money from a lender, but this debt, once reported on the company's 10-Q and 10-K statements, would lower the company's credit rating and alarm investors. To avoid this outcome, Enron would offer to sell to major financial institutions energy futures for \$1 billion. Investors reading Enron's financial statements could not learn that Enron was going further into debt.

Enron's answer was, in part, to manipulate mark-to-market accounting³⁸³. In 1992, after extensive lobbying, Enron received approval from the SEC to value its natural gas trading business. Mark to Market allowed Enron to record estimated future profits from transactions as current operating revenue long before the transactions actually generated any cash earnings. Since there was no clear and definitive market price for these assets, Enron was forced to "estimate" fair market value for Mark to Market purposes.

³⁸¹ Securities offerings are highly regulated by the Securities and Exchange Commission. Unless you qualify for one of the SEC's exemptions, you will need to file an astounding amount of paperwork before your IPO. You may also be required to file annual updates with the SEC. Your first step will be to file a registration statement with the SEC. <http://www.allbusiness.com>

³⁸² J.P.Morgan & Co., "Statement submitted to the Permanent Subcommittee of Investigations, ,Committee on Government Affairs, United States Senate", July 23, 2002. "Prepaid forward commodity transactions are also a form of structured finance. In "forward" commodity transactions, which are common in many industries, the parties enter into a contract for future performance tied to a commodity. A "prepaid forward" provides for payment to be made at the inception of the contract..."

³⁸³ S.Taub, "Question mark to market:Energy Accounting scrutinised",CFO Magazine, Dec 4, 2001. "Mark to market accounting allows companies to count as current earnings profits they expect to earn in the future from energy-related contracts".

Mark-to-Market manipulations generated revenue on paper, but the company needed cash. Enron, however, gave these “sales” a new twist. Assume that Enron signed a contract with another company pursuant to which Enron agreed to sell the company energy over a twenty-year period. Using the Mark to Market accounting method, Enron could record the estimated future profits as revenue at the time of the deal, and then retain the contract and slowly try to collect its payments. This course produced good financial statement results but no immediate cash. In 2000, for example, Enron and Blockbuster, the video rental company, agreed to develop a home video-on-demand business³⁸⁴. Under Enron's interpretation of the relevant accounting rules, Enron believed it could treat the transfer of an asset to another business entity as a “sale” as long as the other entity took 3% of the ensuing business risk. CIBC³⁸⁵ gave Enron \$110 million, and Enron agreed to repay the loan with interest.

Enron's Financial Statement Manipulations “Pre-pays”, “Mark to Market” manipulation, and fraudulent “assets sales” were only the tip of the iceberg at Enron. Enron's efforts to manipulate and “improve” its financial statements had an enormous impact on investors' perceptions about the company. Through pervasive use of structured finance techniques using Special Purpose Entities³⁸⁶ and aggressive accounting practices, Enron so engineered its reported financial position and results of operations that its financial statements bore little resemblance to its actual financial condition or performance. This financial engineering in many cases violated General Auditing Accounting Practice, GAAP, and applicable disclosure laws, and resulted in financial statements that did not present Enron's financial condition, results of operations or cash flows. Financial data manipulation transformed Enron from a de facto insolvent company into an apparently profitable one.

Enron was a failing company, supported by deceitful transactions and financial statement manipulation. In the Enron case, the watchdogs failed miserably, resulting in the deception of millions of investors and the ultimate loss of some \$61 billion. However, Enron's financial statements also violated GAAP in numerous ways and were fundamentally misleading³⁸⁷. Nevertheless, Andersen, Enron's independent

²⁷ K.Cooley, “How not to make money on broadband”, He states that Blockbuster's press release The press release announced the deal as ‘a 20-year, exclusive agreement to deliver a Blockbuster entertainment service, initially featuring movies on-demand, via the Enron Intelligent Network’.

³⁸⁵ Canadian Imperial Bank of Commerce, Daniel Ferguson, Ian Schottlaender, Mark Wolf, Case No. H-03-5785 (Hoyt) (S.D. Tex.). <http://www.SEC.gov/>

³⁸⁶ Also referred to as a “bankruptcy-remote entity” whose operations are limited to the acquisition and financing of specific assets. The SPV is usually a subsidiary company with an asset/liability structure and legal status that makes its obligations secure even if the parent company goes bankrupt”. Explanation by Investpedia, Forbes Media Company.

³⁸⁷ Press Release by SEC, “SEC Charges Kenneth L. Lay, Enron's Former Chairman and Chief Executive Officer, with Fraud and Insider Trading”, July 8, 2004. “The Securities and Exchange Commission today initiated civil charges against Kenneth L. Lay, former Chairman and Chief Executive Officer of Enron Corp., for his role in a wide-ranging scheme to defraud by falsifying Enron's publicly reported financial results and making false and misleading public representations about Enron's business performance and financial condition.”

auditors, issued Enron an “unqualified opinion” every year. Andersen failed culpably in its duty to Enron shareholders and the investing public, although not all of the Enron disaster was Andersen's fault. For example, Enron failed to disclose to Andersen the existence of secret agreements by which Enron guaranteed its transaction partners that they would not lose money³⁸⁸, even if the assets Enron was selling ultimately lost their value. The courts found that Andersen auditors helped design the accounting manipulation schemes Enron used to mislead investors about its income, cash flow and financial position; that Andersen failed to use due care to investigate whether Enron's counterparties in monetization transactions actually had any money at risk in the transactions; and that Andersen failed in its duty to flag unusual transactions and controversial accounting decisions for Enron's board. Andersen gave substantial assistance to Enron officers seeking to disseminate misleading financial information. Andersen's failure appears to have been comprehensive for, if Andersen had not assisted and enabled Enron's deception, Enron would have been caught years before 2001.

Andersen's failure to protect Enron investors was not an isolated incident. Throughout the 1990s, prior to Enron's bankruptcy, Andersen auditors certified false or misleading financial statements for the management of a number of major American companies, including Sunbeam, Waste Management, and the Baptist Association. Prior to 2002, auditors faced potential investigation, disclosure and punishment from four sources: criminal prosecutors, the SEC, the now-defunct Public Oversight Board, and individual investors. Two additional factors may also have affected Andersen's integrity at Enron. Enron's financial statement manipulation increased in intensity in the late 1990s as the company's financial problems increased.

Directors are charged with monitoring management's performance on behalf of the corporation's investors. Enron's fraudulent transactions violated federal criminal securities laws³⁸⁹. When Enron became bankrupt on December 2, 2001, after revelations about insider deals and false accounting, Enron workers lost their jobs in Houston. “Fortune 500”, the business indicator, rated Enron “The Most Innovative Company in America” for five years to 2001. Enron had traded at a price-earnings ratio of fifty-five to one, four times higher than comparable energy and trading firms. Yet, the truth was that Enron was in dire trouble and near financial collapse³⁹⁰.

³⁸⁸ This guarantee was the similar transaction that made the Guinness flotation possible in the serious fraud case in the UK, R v Saunders [1987].

³⁸⁹ SEC Press release, “Called to Account”, October 2, 2002. “The Securities and Exchange Commission filed a related civil lawsuit against Mr. Fastow alleging that he defrauded investors and violated securities laws. The SEC is seeking unspecified civil money penalties against Mr. Fastow and repayment of his allegedly ill-gotten gains. The Justice Department's complaint alleges a conspiracy that began in 1997 when Mr. Fastow designed “clandestine transactions he had rigged up to swindle” investors by placing tens of millions of dollars of Enron debt off the company's balance sheet”. www.sec.gov/

³⁹⁰ L. Brewer and M. Scott Hansen, *House of Cards, Confessions of An Enron Executive* (Virtualbookworm.com Publishing, USA 2002); R. Bryce, *Pipe Dreams: Greed, Ego, and the Death of Enron* (Public Affairs, USA 2002); K. Eichenwald, *Conspiracy of Fools: A True Story* (Broadway Books, USA 2005); L. Fox, *Enron: The Rise and Fall*. (Wiley, USA 2003); P.C. Fusaro and R. M. Miller, *What Went Wrong at Enron: Everyone's Guide to the Largest Bankruptcy in U.S. History* (Wiley, USA 2002); B. McLean and P. Elkind, *Smartest Guys in the*

The Enron fraud investigation resulted in 34 criminal defendants and 34 guilty pleas³⁹¹.

Conclusion to Chapter 6

This chapter examined some cases of serious fraud. The study of the Enron trial, in particular, and the reading of other USA fraud trials, the Worldcom, Global Crossing and Qwest among others show up the need for legislative reform for the interests of investors, employees and the culpability of directors of companies.

A string of class-action suits follow the biggest fraud trials³⁹², based on the same factual allegations contained in the relevant fraud trials, as occurs in France and Germany. Such lawsuits assert that the company, its directors, officers and gatekeeper auditors, breached their fiduciary duties by issuing false and misleading public statements about the particular company's financial condition, thereby inducing employees and others to invest in company shares at artificially high prices. In the United States, there is statutory framework, apart from the Penal Codes to combat fraud, by way of federal securities laws, enacted after the stock-market crash of 1929, namely the Securities Acts 1933 and 1934 and the Employee Retirement Income Security Act 1974 which deals with investment in company shares. The statute defines who is a fiduciary. The Sarbanes Oxley Act 2002, after Enron further tightens up the area of corporate compliance.

In Germany, large-scale corporate fraud cases include the telecommunications company Vodafone takeover of Mannesmann for \$186 billion US, in which over-large payments of \$65 million were made to executives. This case was a breach of trust case. Germany, like the UK, France and other EU member states, has many carousel Value Added Tax fraud cases in which the Value-Added-Tax rules are exploited. However, there is a precedent case which gives corporations and individuals an escape from fraud charges by way of the decision in Optigen, Fulcrum, Bond Houses (C-354/03, C-355/03, C-484/03) which is that the right of a

Room: The Amazing Rise and Scandalous Fall of Enron (Portfolio, USA 2003) and M. Swartz and S. Watkins, *Power Failure: The Inside Story of the Collapse of Enron* (Doubleday, USA 2003)

³⁹¹ See various reports in the Houston & Texas Chronicle at <http://www.chron.com>

³⁹² See D. Gische and J.A. Abraham, "Corporate Fiduciary Liability Claims in the Post-Enron Era", *FINDLAW*, 24th October 2002.

taxable person to deduct input VAT cannot be affected by a prior subsequent fraudulent transaction of which they were unaware. Recently, because this type of fraud costs the UK over £6 billion each year, the EU has allowed the UK to bypass this ECJ decision. Germany is however still under the ECJ ruling.

In France, law No. 2003-706 of August 1st, 2003, on financial Security was adopted by the French Parliament one year after the United States Sarbanes Oxley Act 2002, with the same objective of restoring the trust of the investors in the French Markets. This new law, representing legal reform, can be said to combat fraud in that it modernises the authorities supervising financial activities, reinforces investors' protection, modernises the auditing of company accounts, and improves company transparency within joint stock companies. This Act changes the face of fraud trials in France because prior to this Act, the French Commercial Code did not mention who was responsible for providing information to directors, information as per Article 225-35 Commercial Code, necessary for the accomplishment of his or her mission., ie all relevant information. Now the President of the Board or the CEO is the person responsible for disseminating information to directors of the company board, even though corporate fraud is still joint liability. The Act also improves quality of shareholder information. By way of a report set out as to content, control procedures, report to auditors and reorganisation of certain rules of operation of corporations.

The UK has provisions for class action lawsuits also in cases where a need can be shown in a specific area for greater access to justice.³⁹³

In the Enron case, Andersen had reported the document destruction, was cooperating with investigators, and, incidentally, was making efforts to compensate Enron investors. Citing the firm's involvement with frauds at other firms, the prosecutors indicated they would forego indictment only if Andersen admitted its guilt. It demonstrates the authority of US federal prosecutors to charge and convict a business entity based on the doctrine of *respondeat superior*, which makes business

³⁹³ See Lord Chancellor's Department document, published April 2002, Consultation Response on the procedure for proposed representative claims adopted within the Civil Procedure Rules

See also L.J. Harbour, V.W. Addam and O. Debouzy, "Representative Actions: Access to Justice?", Findlaw, February 20th 2003.

firms criminally liable for crimes committed by their agents. It illustrates how, once an accountant becomes involved with the criminal justice system, the stigma makes for collateral consequences which include the reaction of the marketplace, class-action civil suits, enforcement actions by regulatory agencies, and being barred from government contracts. There were 14 former Enron executives facing criminal charges and who were also facing civil SEC enforcement actions. Another fact of US fraud trials is that Sentencing Guidelines reduce judicial discretion by requiring judges to calculate a guideline range and then to sentence within that range. Sentences that depart from the guideline range are appealable. This is one very strong deterrent to fraud and one reason why the US justice system has 95% plea bargaining and confessions.

The investigation of the complex financial fraud at Enron followed a typical course, as prosecutors closed cases by indicting corporate officers and obtaining plea and cooperation agreements from them. Much of the success of the current United States criminal investigations is a result of the prosecutor's authority to negotiate plea agreements. In one sense, all defendants may negotiate to exchange their expensive procedural rights and a long sentence for the "certainty and ease of conviction" and a lesser sentence. As the Enron cases indicate, the US Federal prosecutor influences sentences and holds broad authority to exchange lower prison terms for a guilty plea and cooperation.

CONCLUSION AND RECOMMENDATIONS

Corporate fraud in general

This study reveals the many issues that are inter-connected to the issue of corporate fraud. The relevant legislation spans across many areas of the law – criminal and civil. Corporate fraud contains issues of cross-country transactions and electronic issues of e-commerce, all of which makes antifraud strategy a very complex and intricate international matter.

The preceding six chapters reported on various dimensions of serious fraud crimes, using a literature review, analysis of anti-fraud agencies and analysis of certain facets of the law. The fine line between legitimate business practices and fraud makes it difficult for the law to adequately protect against fraud without impeding business. In an environment of high unemployment, governments are reluctant to add obstacles to business enterprise. Eradication of serious fraud is the goal to aspire to, through diverse strategies, incremental reductions might be achieved.

All countries are aware of competition and although they may have anti-fraud laws, they may see business regulation as a hindrance to profits. Germany's present attitude is a mix of voluntary social responsibility and regulation. In Germany, though, cartels have always been such a common phenomenon that the country has long had the Bundeskartellamt (Federal Cartel Office, FCO) , similar to the UK's Office of Fair Trading (OFT).

UK Corporate Fraud Summarised

The objective of this research study was to compare and contrast fraud in the stated countries in order to find legal strategies operating in other countries that the UK can consider for implementation in the combat of serious fraud.

The UK has recent legislation for the seizure of assets but not for victim compensation for fraud although it does provide for victim compensation in some theft offences. France and Germany also have laws for seizure of the proceeds of fraud. However, neither in the UK nor France or Germany is there is automatic rescission of contract due to fraud, as there is in many states of the USA.

The UK has installed aspects of legal responsibility to report suspicious transactions in its Money Laundering Regulations. The UK has whistle-blowing protection for employees. The Serious Fraud Office of the UK announced that corruption is one of the fraud offences it will deal with and the House of Lords has agreed in the Fraud Act, the inclusion of corruption as a fraud.

The Fraud Act 2006, section 12, sets out certain circumstances in which company officers are liable for an offence committed by a body company. Section 12 provides that if persons who have a specified corporate role, 'consent or connive' with the commission of an offence under the Fraud Act 2006 by their body corporate, those persons as well as the company, will be guilty of an offence. As well as this, Part 36 of the Companies Act 2006 contains specific criminal offences [ss.1121-1131]. Also, Part 29 of the Companies Act 2006 [s.993] creates an offence of fraudulent trading exactly in the terms as set out in Companies Act 1985, section 458. Directors can also be charged with the offence of false accounting as per Theft Act 1968, section 17, which remains in force as well as the Fraud Act. Apart from the Fraud Bill 2006, fraud can be an offence under other statutes.

The Fraud Act will have a wide scope and it includes the offence of obtaining services dishonestly, being in possession of articles for use in frauds and making and supplying articles for use in frauds. It brings a new offence of participating in a fraudulent business carried on by a sole trader and penalties that are more robust than the Theft Acts. Fraud activities result in higher prices for "security systems, banking services, credit and goods and insurance and cost UK businesses by undermining confidence in the institutions which are needed to trade and create wealth", as per Hansard, col.565, 12th June 2006. The UK authorities are concerned with all fraud, even when fraud occurs outside the UK and a national of the United Kingdom or a body incorporated under the law of any part of the United Kingdom commits fraud in a country or territory outside the United Kingdom.

To this regard, the SFO's remit includes serious corruption fraud. As to bribery, where a person in the position of trustee to perform a public duty, takes a bribe to act corruptly in discharging that duty, it is an offence in both parties. The offer of a bribe is an attempt to bribe, and is also a fraud offence. The offence of bribery is punishable by fine and/or imprisonment, whether the bribe is accepted or not. The

UK has a Prevention of Corruption Act 1916 and a Public Bodies Corrupt Practices Act 1889 as well as the new Fraud Act 2006.

All fraud in the UK can be investigated by persons as stated in the Investigatory Powers Act, these being Police, SFO Officers, HMRC officers, bookmakers' investigators and prison officers. The Criminal Justice Act 1987 section 2 gives the Director of the SFO special powers of investigation of complex fraud. Fraud by false representation is a criminal offence under the Fraud Act 2006. It is also an offence under the Insolvency Act 1986. VAT and tax fraud committed by companies, can be investigated by 'lifting the corporate veil' of the company. Where a fraudulent scheme to cheat the Revenue results in the evasion of tax, the unpaid tax is a "pecuniary advantage". Oftentimes, a company is incorporated for purposes of fraud.

Hearsay and double jeopardy rules abolished

Hearsay is now admissible in criminal proceedings and is governed by the Criminal Justice Act 2003. However there are constraints to hearsay in s121CJA 2003 which requires certain conditions for admissibility of multiple hearsay.

Time limitation

In regard to the Fraud Act 2006, the UK criminal fraud offence has no time limitation. As to other UK criminal prosecutions - prosecutions can run out of time and/or evidence can become time barred according to the particular statutes relevant to the case. (Evidence by a thief to prove that he had sold stolen property and given it to the handler at some previous time was admissible against the handler at common law, and was not excluded by the time limitation in the Theft Act statute, in *R. v. Powell*). Another example, *R v Davis*, is where the material words in the relevant statute are "not earlier than twelve months before the offence charged" and since the statute did not read "within the period of twelve months before the offence charged" evidence is admissible under this provision of the possession of other stolen goods at a date after the date of the offence charged. Time limit is found specifically in the French Criminal Code.

Money Laundering

As to money laundering, offences of failing to disclose possible money laundering relate to those working in the business sector as per CJA 1988, s 330-332. Each of

the principal money laundering offences (ss.327 to 329) requires proof that the conduct concerned "criminal property" which is defined in section 340(3). The threshold amount for this money laundering offence is £250 as per Proceeds of Crimes Act 2002, section 33A(2).

Germany and France also have money laundering laws as mandated by the EU Money Laundering Directives. France and Germany do not treat money laundering fraud offence with the gravity the UK and US do. As an instance, both France and Germany treat charitable corporations very generously and both countries give extremely generous tax benefits to charitable corporations whilst the federal United States has stepped up its Inland Revenue Investigations on charities as a monitoring method.

Restitution

When a fraud is committed, voluntary monetary restitution is *not* taken as a mitigating factor as under the Theft Acts 1968 and 1978. But after conviction, orders for restitution can be made under the Powers of Criminal Courts (Sentencing) Act 2000, s.148.

Prosecutions against Authorities

Any victim of any unlawful act including fraud may bring proceedings against any public authority under the Human Rights Act in an appropriate court but this has a limitation period of one year beginning with the date on which the act complained of took place.

Unlike the UK (with one core fraud offence) and the US with its core Criminal Code Fraud Offences and other statutes dealing with fraud, both France and Germany have combated fraud solely through their Criminal Codes. France and Germany have close trade ties, similar Criminal Codes and reasonably similar cultures and they do much business together (as a recent instance of this is the report that Deutsche Bank SAE has agreed to acquire a 5% stake in France Telecom Operadores de Telecomunicaciones SA from Endesa SA for €377.9 million). In France, tax plays a big part in confiscating what might be classed elsewhere as proceeds of fraud during the 1980's such an excess fraction of the asset's book value was regarded as the company's income and treated as overt fraud.

US & UK as adversarial legal systems; France & Germany inquisitorial legal systems

Modern adversarial and inquisitorial systems are not as distinct as they once were. The inquisitorial systems of France & Germany have both adopted properties of the adversarial mode, notably by guaranteeing defendants' rights that are similar to those guaranteed by the United States' Constitution. Only the UK has derogated some of these rights. Furthermore, there is no single, uniform inquisitorial model as the 27 member states of the European Union have many differences in legal systems.

It is in their approaches in the determining of truth that the adversarial and inquisitorial systems differ. One could argue that truth in UK and US adversarial system is a by-product of a competitive process whilst the French and German investigatory approach to criminal matters is one in which governments utilize the state's power to carry out an inquiry.

The centrepiece of the inquisitorial process is the criminal investigation. In France, the officials concerned with investigating, charging, trying, and sentencing criminal defendants are members of the judiciary. French prosecutors work within a centralized bureaucratic hierarchy. The goal of the French investigation is to assemble a catalogue of evidence, a dossier, of the case. The dossier provides the evidentiary justification for judgment and is a legally competent basis for prosecution and conviction.

In the United States' federal adversarial system, the prosecutor is a member of the executive branch, which is charged with enforcing laws enacted by Congress. The US prosecutor enjoys discretionary authority. Prosecutorial power in the French system is shared. In Germany, the federal chief prosecutor is subordinate to the federal minister of justice. The German prosecutor singularly has wide powers of recording the complaint of victims, instigating the prosecution, directing police inquiry, prosecutes and ensures the execution of sentencing. The UK prosecutor for serious fraud does investigate the fraud as well, somewhat like the US, French and German prosecutors. The US, France and Germany do not allow serious fraud prosecution in the defendant's absence although the UK does. The defendant in Germany, France and the UK can have the appointment of counsel at public expense. In Germany, the judge seeks out the truth without being bound by statements recorded at trial. In France, the judge seeks out the truth usually just using the documentary evidence or dossier. In the US and UK, the jury seek out the truth, directed by the judge. As regards the right to silence at trial, this is respected in the

US, UK, France and Germany; In France and Germany, it is advisable that the defendant speak, otherwise the whole of the case rests on documentary evidence. Documentary hearsay is allowed in France and Germany and both oral and documentary hearsay is allowed in the UK and US. Double jeopardy rule is abolished in the UK, but not in the US, France or Germany.

Incorporation Differences and Auditor Liability

As to the reasons for fraud in the US which differ from frauds in the UK, one is that private benefits of control can be misappropriated in a U.S. public company, illustrated in Tyco, Adelphia and Enron. The UK also has companies with dispersed ownership whilst such is not the case in France and Germany.. Concentrated share ownership, as in France & Germany, invites the low-visibility extraction of private benefits yet, this does not happen and might imply that European countries are more ethical. Rather the reason may be that US executives enjoy stock options as is not seen in the UK or France and Germany. This share ownership might be the driver to keep the share price up by any means, including false accounting.

Another factor for the difference in frauds might be that in the US, the auditor/gatekeeper reports to the executive Board whilst in the UK the auditor reports only to the shareholders of the company. The independent auditor arose in Britain in the middle 19th Century, just as industrialization and the growth of railroads was compelling corporations to market their shares to a broader audience of investors.⁵⁷ Amendments in 1844 and 1845 to the British Companies Act required an annual statutory audit with the auditor being selected by the shareholders.⁵⁸ This made sense, because the auditor was placed in a true principal/agent relationship with the shareholders who relied on it. But this same relationship does not exist when the auditor reports to shareholders in a system in which there is a controlling shareholder, as is often the case in France & Germany.

Twenty-three Recommendations to Combat UK Corporate Fraud

In conclusion, having examined and analysed corporate fraud in these countries in a holistic and thorough way, and in view of the fact that this research was aimed at finding out if there were factors in the study to assist in the reduction of UK fraud, I make the following recommendations:

1. All breaches of directors responsibility, now codified since the new Companies Act 2006, should also carry full criminal penalties as a deterrence. At present, the only criminal penalties for directors are for false accounting, fraudulent trading and destruction of documents. Destruction of documents should carry a stiffer imprisonment punishment. At present this is 7 years, whilst in the US, this offence has a 15 years maximum prison sentence.
2. The UK needs a centralised corporate crime database as in France.
3. All listed companies in the UK should disclose their litigation records, as in the US.
4. Although the UK Fraud Act 2006 provides for a corporation to be fined for fraud, the Fraud Act is non-codified, unlike fraud offences in the US, France and Germany. French Criminal Code stipulates a set monetary fine for corporate fraud, being 5 times the fine that a person would suffer. The Fraud Act is silent as to what the fine would be and does not state that it will be “unlimited”.
5. There should be a stipulated and effective method for determining corporate *mens rea*. The Fraud Act simply determines dishonesty. Rather than looking for a corporation’s or officer’s dishonesty, corporate fraud should be determined completely differently, by looking at the corporation’s reaction to the illegal act. Does the company cover up or does it take steps to prevent repetition? The standards for prosecution of corporations should not be arbitrary but must be tightened.
6. The budgets for SOCA, OFT, DTI, HMRC and FSA should all be provided by the government rather than the self-financing method that is being implemented. This eradicates conflict of interest. In France and Germany, the judiciary are all career civil servants, paid by the government.
7. The human rights of companies should be redefined and companies should not enjoy “human rights” as they do today in the UK. Companies should not have human rights of double jeopardy, hearsay rules, right to silence or to be Legal

Aid funded. Both the UK and the US, with companies enjoying human rights, but not in France or Germany.

8. The UK is in the initial stages of implementing 'Neighbourhood Policing' and this should be extended to 'Neighbourhood Watch Committees' to monitor corporate crime. Police could foster groups to watch for corporate criminal activity. To facilitate this, citizens should be given free training to learn the laws governing consumer fraud and false advertising.
9. The UK Fraud Act makes fraud a criminal offence which means that to prove the offence, it needs to be proved beyond a reasonable doubt. For corporate fraud, the proof should be "*on the balance of probabilities*". In cases which involve scientific dispute, for example, it is almost impossible to prove "beyond a reasonable doubt".
10. It is widely known that the UK police do not like to occupy themselves with fraud prevention or detection. UK Fraud squad police used to volunteer to go to that department. Since the passing of the Fraud Act, UK police have handed the major responsibility with regard to credit card fraud, to banks. Rather, if police were made liable for failure to act, this would accomplish two things- it would increase fraud detection by police and it would deter bribery and corruption by preventing the acceptance of gifts. This type of policing would make the police institutionalised in the field of corporate crime police work, where the temptations not to prosecute are greater than in other areas of police work.
11. Class actions are beginning to appear in the UK and more of this will serve as an important law enforcement function/deterrence.
12. The US has a citizen bounty- hunting provision for anyone who whistle-blows on fraud. This could be copied in the UK. If a citizen reports a company, and a

conviction is secured, the citizen should be entitled to collect a small part of the fine imposed on the company.

13. All executives convicted of fraud should be barred from holding similar office.
14. Impose Sentencing Guidelines for corporate fraud as in the US. In the US, any sentence that is passed and is below the guidelines provided, is appealable.
15. Effective probation must be imposed on corporate fraudsters and they should be required to make restitution to their victims.
16. Rehabilitative sanctions can be imposed on corporations which commit fraud. A judge can order such a corporation to rearrange their operating procedures, ineffective communication systems and internal codes, as for example. By the US Sarbanes Act 2002.
17. Executives found guilty of UK corporate fraud should not only be imprisoned but should have behavioural sanctions.
18. Instead of enormous fines on companies which commit fraud, the courts should impose equity fines. If fines are imposed in the equity securities of the company by way of authorisation and issue of a number of shares to the UK's victim compensation fund at market value equal to the monetary value of the fine, this poses a much greater punishment since the market value usually exceeds cash value of fine.
19. Convicted fraudsters should be imprisoned with the rest of the prison population at large instead of being sent to "country club" open prisons. The executive convicted of fraud should be sent to prison with the street criminal. The cartel fixer should be imprisoned alongside the burglar, the drug trafficker, the murderer, because the fraudster is a criminal. This might improve prison conditions for all prisoners, as a side effect, as the executive fraudster will insist on improvement.
20. Adverse publicity should be mandated for convicted corporations. Since corporations spend millions of pounds on corporate image advertising, the court should require the convicted corporation to give appropriate publicity to the conviction, by advertising in designated areas or by designated media, or otherwise. This is required especially as many large corporations have strong

influence over the media in general. Corporations control media through their heavy advertising budgets.

21. Convicted corporations should be prohibited from applying for and obtaining government grants, licences or contracts. This applies especially in the defence industry where the government is the best customer.
22. The UK should have a dedicated 'Corporate police', as in France, and their remit must include their surveillance of convicted corporate fraudsters.
23. Criminalise faulty compliance procedures in corporations.

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